TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 383

HOWARD R. MARSHALL, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5796

HOWARD R. MARSHALL, Appellant,

vs.

THE UNITED STATES OF AMERICA, Appellee.

APPELLANT'S STATEMENT OF POINTS—Filed January 10, 1958

The Appellant will rely on the following Points:

1. The District Court was without jurisdiction of the offenses involved herein, and if it is deemed to have by reason of construction of the statutes involved, then to that extent, said statutes would be unconstitutional.

2. The Court erred in not directing a judgment of acquittal when the evidence proved entrapment and the Government did not offer, nor have to offer, rebuttal evidence.

3. The Appellant was deprived of a fair trial by reason of the fact that the Jury during the course of the trial read newspaper accounts relative to the Appellant's alleged background in crime and previous convictions.

4. The verdicts were not supported by substantial evidence.

George J. Francise, Attorney for Appellant.

Filed January 10, 1958.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 15,043, Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

HOWARD R. MARSHALL, Defendant.

INFORMATION

21 U.S.C. 331 and 333, Misbranding thru indiscriminate dispensing of drugs without prescription.

Count I

The United States Attorney charges:

That prior to April 23, 1956, a number of dextroamphetamine sulfate tablets, a drug within the meaning of 21 U.S.C. 353(b)(1)(B), were shipped in interstate commerce into the State of Colorado;

That thereafter, on or about April 23, 1956, and while a number of tablets of said drug were being held for sale after shipment in interstate commerce, as aforesaid, in the City and County of Denver, State of Colorado, Howard R. Marshall, the defendant herein, did, at the City and County of Denver, State of Colorado, within the District of Colo-
[fol. 3] rado, cause a number of tablets of said drug to be dispensed in a tissue paper type package to one Robert E. Keating, without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug, as aforesaid, was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said tissue paper type package being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

Count II (Withdrawn)

* * * * * * *

Count III

The United States Attorney further charges:

That prior to May 1, 1956, a number of dextroamphetamine sulfate tablets, a drug within the meaning of 21 U.S.C. 353(b)(1)(B), were shipped in interstate commerce into the State of Colorado;

That thereafter, on or about May 1, 1956, and while a number of tablets of said drug were being held for sale after shipment in interstate commerce, as aforesaid, in the City and County of Denver, State of Colorado, Howard R. Marshall, the defendant herein, did, at the City and County of Denver, State of Colorado, within the District of Colorado, cause a number of tablets of said drug to be dispensed in a vial to one Robert E. Keating, without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug, as aforesaid, was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said vial being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

Donald E. Kelley, United States Attorney for the District of Colorado.

[fol. 4]

In United States District Court

Arraignment and Plea—May 24, 1957

On the 24th day of May, 1957, The United States of America appeared by James C. Perrill, Assistant United States Attorney and the defendant appeared in person and by his counsel George J. Francis, Esq., before the Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, and the defen-

dant waived the reading of the information, and entered his plea of not guilty to Counts 1, 2, and 3.

Entered on the Docket May 24, 1957.

IN UNITED STATES DISTRICT COURT

VERDICT—September 30, 1957

We, the jury in the above entitled case, upon our oath do say, we find the defendant Howard R. Marshall guilty as charged in count one of the information herein.

Dorothy T. Cleland, Foreman.

Filed September 30, 1957.

IN UNITED STATES DISTRICT COURT

VERDICT—September 30, 1957

We, the jury in the above entitled case, upon our oath do say, we find the defendant Howard R. Marshall guilty as charged in count three of the information herein.

Dorothy T. Cleland, Foreman.

Filed September 30, 1957.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed October 5, 1957

The Defendant moves the Court to grant him a new trial for the following reasons:

[fol. 5] 1. The Court erred in denying defendant's motion for acquittal as to the first and third counts of the information at the conclusion of the evidence.

2. The Court erred in charging the jury.

3. The Court erred in not admitting into evidence defendant's exhibit A.

4. The defendant was subjected to prejudice and deprived of a fair trial by reason of the following: the reading of newspaper accounts relative to the defendant's background by members of the jury.

5. The Court erred in denying the defendant's motion for a mistrial.

6. The Court erred in not directing a judgment of acquittal on Counts 1 and 3 when the evidence proved entrapment and the Government did not offer, nor have to offer, rebuttal evidence.

7. The verdict is not supported by substantial evidence.

George J. Francis, Attorney for Defendant.

Filed October 5, 1957.

IN UNITED STATES DISTRICT COURT

MOTION IN ARREST OF JUDGMENT—Filed October 5, 1957

The defendant moves the Court to arrest the judgment for the following reasons:

1. The information does not state facts sufficient to constitute an offense as to counts 1 and 3.

2. The Court is without jurisdiction of the offense in that there was no showing of interstate commerce and that if the evidence is considered as establishing interstate [fol. 6] commerce by reason of the construction of the statute involved, then to that extent said statute is unconstitutional.

George J. Francis, Attorney for Defendant.

Filed October 5, 1957.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION IN ARREST OF JUDGMENT AND FOR A NEW TRIAL—October 28, 1957

This Matter coming on for hearing on this 25th day of October, 1957, upon defendant's motions in arrest of judg-

ment and for new trial, the defendant appearing in person and by George J. Francis, his counsel, and the plaintiff appearing by Robert S. Wham and James C. Perrill, Assistant United States Attorneys for the District of Colorado, and the Court having heard arguments of counsel and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the defendant's motions in arrest of judgment and for new trial be and the same are hereby denied.

Dated at Denver, Colorado, this 28th day of October, 1957.

William Lee Knous, Chief Judge, United States District Court.

Entered on the docket October 28, 1957. G. Walter Bowman, Clerk.

In United States District Court

Judgment and Commitment (Rev. 7-52)—October 25, 1957

On this 25th day of October, 1957 came the attorney for the government and the defendant appeared in person and by George J. Francis, his counsel,

[fol. 7] It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to each of Counts I, II and III, and a verdict of guilty as to each of Counts I and III of the offenses of misbranding through indiscriminate dispensing of drugs without prescription in violation of 21 U.S.C. 331 and 333, as charged in the Information herein, Count II having previously been dismissed by order of Court;

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months upon each of Counts I and III of the Information herein, said periods of imprisonment to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous, United States District Judge.

Entered on the docket October 25, 1957.

In United States District Court

Notice of Appeal—Filed November 4, 1957

Notice is hereby given that Howard R. Marshall, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment and sentence of this Court entered on October 25, 1957.

George J. Francis, Attorney for Appellant.

Filed November 4, 1957.

[fol. 8]

In United States District Court

Amended Notice of Appeal—Filed December 2, 1957

The Appellant's name is Howard R. Marshall and his address is 768 Colorado Blvd., Denver, Colorado.

Appellant's attorney is George J. Francis with offices in the Farmer's Union Bldg., Denver 3, Colorado.

The offenses involved are "Misbranding Through Indiscriminate Dispensing of Drugs without Prescription" in violation of Title 21, United States Code, Section 331(k) on or about April 23, 1956, and on or about May 1, 1956.

The Judgment of this Court dated October 25, 1957, was that the Defendant be imprisoned for six months for each of the above Counts, to be served concurrently.

The above named Appellant hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated in Denver, Colorado, this 2nd day of December, 1957.

George J. Francis, Attorney for Appellant.

Filed December 2, 1957.

[Clerk's note: An order was entered December 4, 1957 extending the time to docket the appeal to January 3, 1958.]

IN UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings

ROBERT E. KEATING, a witness called on behalf of the Government, being duly sworn, testified as follows:

[fol. 9] Direct examination.

By Mr. Perrill:

Q. State your name, please.
A. Robert E. Keating.
Q. Where do you live?
A. 1191 Galena Street in Aurora, Colorado.
Q. What do you do?
A. I am an Inspector for the United States Food and Drug Administration.
Q. What is the location of your employment?
A. Denver, Colorado.
Q. How long have you been so employed?
A. Approximately 7 years.
Q. Continuously?
A. Yes, sir.
Q. Would you describe for us briefly the nature of your duties as Inspector for the Food and Drug Administration?
A. As an Inspector for the Food and Drug Administra-

tion, I am to make factory inspections of firms in the manufacture of food, drugs and cosmetics; to collect samples of these products and to make certain other investigations to determine if there is violations of the Food, Drug and Cosmetic Act.

Q. Do you know the defendant, Mr. Keating?

A. Yes, sir.

Q. By what name, if any?

A. Mr. H. R. Marshall.

Q. Can you tell us where he is seated here in the courtroom?

A. He is this gentleman in the light brown suit at the defense table.

Q. Do you recall when you first met him?

A. Yes, sir.

Q. When and where was this?

A. I first met Mr. Marshall here in Denver on the evening of April 18, 1956.

Q. Where was this?

A. This was in the Castle League Guest House at 475 East 10th Avenue in Denver, Colorado.

Q. Who else was present at that time?

A. Mr. Marshall and Mrs. Marshall and the person who introduced me to them, a man by the name of Robert Anderson.

Q. Did you have any conversation within the presence of the defendant at that time?

A. Yes, sir.

Q. What nature of conversation?

A. It was purely a social conversation.

Q. Now, directing your attention, Inspector Keating, to the date April 23, 1956, I ask you whether or not you saw the defendant on that day?

A. Yes, sir, I did.

Q. Where?

A. At the same location as on the previous visit, this was in the Castle League Guest House in Denver, Colorado.

[fol. 10] Q. Did you have occasion to have a conversation with the defendant at that time?

A. Yes, sir.

Q. Who else, if anyone, was present?

A. At the beginning of the conversation only Mr. Marshall and I were together, and later we retired to his apartment where his wife was present.

Q. Would you tell us the conversation you had with the defendant at that time; that is, tell us what you said and what he said?

A. Upon my arrival at the apartment house I called at their apartment; that is, the Marshall's apartment. I spoke first with Mrs. Marshall, asking for Mr. Marshall. She told me he was——

The Court: You needn't tell what Mrs. Marshall said.

Mr. Perrill: Just in the presence of Mr. Marshall.

A. (Continuing) I sought out Mr. Marshall on the lower floor of the—in the dining room, and after exchanging greetings and engaging in a little social conversation, I explained that I was having to drive to Dallas, Texas, that evening, and requested he provide me stay-awake pills to help me in this traveling.

At the end of my request—statement, he stated to me that I should obtain some No-Doz tablets and take these while driving to Texas, and drink coffee in the connection of taking these tablets.

I told Mr. Marshall that I believed I had tried these similar tablets at least on other occasions. They had not provided the desired effect and I had hoped I could get something different this time. He again stated that I should use the No-Doz tablets and drink plenty of coffee during my trip to Dallas, and I turned the conversation to other matters.

I asked him if he had a map of the area between here and Dallas and he said that he did. After this we retired to his apartment on the first floor of the building where Mrs. Marshall was present and he obtained the map. We went over this map together and engaging in social conversation we mapped out what we thought was a proper route for me to take.

After this was over I bid them good-by and left the apartment. I walked out of the apartment and out onto the sidewalk. As I reached the sidewalk Mr. Marshall [fol. 11] hailed me. I turned and saw him standing on the

porch. He said for me to wait for him, which I did. As he came up to me on the sidewalk he handed me a small package comprised of tissue paper or toilet tissue wrapped with a rubber band.

He told me that there were some tablets and some capsules in this package and he told me to use them on my trip to Dallas. He told me to use the tablets during the trip and that if I felt nervous after I arrived in Dallas I should take the two capsules.

Q. What did you do after that?

A. Well, after this I left Mr. Marshall's presence, went to the car and drove a few blocks away and opened the package.

Mr. Francis: I object to any testimony as to what the witness did subsequent to leaving the presence of the defendant.

The Court: I didn't understand.

Mr. Francis: I object, your Honor, to any testimony of this witness with respect to his actions out of the presence of the defendant.

The Court: That would be—the objection is overruled.

Q. Inspector Keating, state what, if any, conversation you had with the defendant at this time, April 23rd, that you have testified, during your talk with him relative to having a prescription for the substance that he gave you?

A. There was no conversation of this nature.

Q. What, if any, prescription did you give him at that time?

A. I gave him no prescription.

Q. What, if any, discussion was there with the defendant?

The Court: You are leading the witness. You asked him what the discussion was and he can tell the whole conversation, without asking him was there any talk about this or any other thing. Let him say what happened.

Mr. Perrill: Excuse me a moment, your Honor.

[fol. 12] The Court: The law requires that the whole conversation be given, not certain portions of it selected by counsel. The jury is entitled to hear the whole conversation.

Mr. Perrill: All right, sir, thank you.

Q. Now, when you arrived at your car as you testified, at that time, what did you do?

A. Well, as I have said, I opened the package and found inside five yellow tablets, rounded shape and acored (sic) across the center. By scoring, I mean there was a groove or indentation across its full width. After noting the contents, I placed the five tablets in a small paper envelope which I sealed and then applied an official Food and Drug Administration seal with the sample number, 51-539M and the date and my initials, or, my name, and I kept this sample in my possession throughout the balance of the evening and the following morning after 8:00 o'clock I submitted this sample to the Denver District Laboratory for the Food and Drug Administration in the New Customhouse Building, Denver, Colorado.

(Envelope marked Government's Exhibit No. 1 for identification.)

Mr. Perrill: Let the record show that at this time I break open envelope marked for identification as Government's Exhibit 1, which had the seal "William V. Eisenberg" thereon.

The Court: The exhibit, if admissible, will speak for itself. That remark will be disregarded.

Mr. Perrill: It was in that condition when I broke it.

The Court: You are not testifying, you are not under oath. If the exhibit is admissible somebody can testify what it is and the markings on it.

Mr. Wham: What counsel is trying to say was that at the time he broke open the envelope in the presence of the Court here, he broke the seal which had the marking "William V. Eisenberg" on it. That is all he wished the record to show.

[fol. 13] The Court: The jury will disregard it. That will appear if it is admissible.

(Envelope marked Government's Exhibit No. 1-A for identification.)

Q. Inspector Keating, I hand you what has been marked for identification purposes as Government's Exhibit 1-A. Can you tell me what that is?

A. Yes. This is the envelope which I have just described that I identified and sealed in the fashion that I described. I can identify it by the seal which bears the sample No. 51-539M.

The Court: It has been admitted in evidence, you have described it.

Mr. Perrill: Let the record show I remove from the envelope marked for identification as Government's Exhibit 1, a vile. (sic)

Q. I hand it to you, Agent Keating, and——

The Court: You better have it marked with some number.

(Vile (sic) marked Government's Exhibit No. 1-B for identification.)

Q. —which I have caused to be marked as Government's Exhibit 1-B for identification, I hand you this and ask you what that is?

A. This is a vile (sic) bearing a label. Now, do you want me to describe what is on this label?

The Court: You can tell him what it is.

A. (Continuing) It is a vile (sic) containing a tissue package, or wad of tissue, and the tissue contains some whole and some pieces of some yellow tablets.

Q. Now, with respect to the contents of what has been marked for identification Government's Exhibit 2, have you seen that before?

A. Yes, this tissue paper bears the——

Mr. Francis: Your Honor, I believe the exhibit was identified as 1-B.

[fol. 14] Mr. Perrill: I mean Exhibit 1-B, that was my error.

Mr. Francis: I would object to testimony as to the contents of it.

The Court: He has to testify as to what it is. The objection is overruled.

A. (Continuing) This tissue is the one I received from Mr. Marshall on the evening of the 23rd of April, 1956, and

I recognize it is because I identified it at that time and these tablets appear to be——

Q. How did you identify it?

A. I identified it with the sample number, the date and my initials, and the one whole yellow tablets appears to be of the same type that I received from the defendant on that occasion.

Q. What did you do with the tissue and the contents in it?

A. The tissue was identified as I previously explained and the tablets were left inside the tissue and the tissue was placed in this plain white envelope that I have identified as the one that was sealed by me on that occasion.

Q. You mean what has been marked for identification purposes as Government's Exhibit 1-A?

A. I do, sir, yes.

Mr. Perrill: Excuse me one moment, your Honor.

Q. Then what, if anything, did you do with what has been marked as Government's Exhibit 1-A, the envelope?

A. This is the envelope that I submitted to the Denver District Laboratory of the Food and Drug Administration on the morning of April 24, 1956.

Q. In what condition was the envelope at that time?

A. At that time the envelope was sealed; that is, my seal was unbroken.

Q. I ask you whether or not that seal appears on what has been marked for identification as Government's Exhibit [fol. 15] 1-A?

A. Yes, the seal that I described previously is on this exhibit.

Q. Did you sign your name on that seal, Inspector Keating, that you have referred to?

A. Yes, sir.

Q. Now, Inspector Keating, directing your attention to May 1st, 1956, I ask you whether or not you saw the defendant on that day?

A. I did.

Q. Where?

A. I contacted him at his apartment at 440 East 13th Avenue, at Denver, Colorado, on the evening of that day.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Who else, if anyone, was present?

A. Mrs. Marshall and Mr. Marshall were both present.

Q. Would you state the conversation you had at that time, what was said by the respected parties?

A. I was admitted to the apartment by Mrs. Marshall and after exchanging greetings with both of them and a short amount of social conversation, they asked me how my trip to Dallas had been and I told them that I had gotten along very well.

Mr. Marshall then asked me what my problem was and I told him that it was necessary for me to drive from Denver to Los Angeles the following day and that I would like to get a bottle of each of the drugs that he had supplied me previously, perhaps as many as a hundred of each of these drugs to have in the car at all times. Mr. Marshall said he didn't have that many at that time and if I would return later he would have them for me. I asked him if he had to go to the drugstore to get them and he stated that he probably would have to do this. I suggested that I accompany him to the drugstore and thereby save myself a trip, but he requested that I come back either later that evening or the following day. I told him that I would return later that evening, and left.

After an approximate hour and a half's wait I returned to this same apartment at 440 East 13th Avenue, in Denver, [fol. 16] Colorado, and was again admitted to the apartment by Mrs. Marshall. As I entered, Mr. Marshall left the room and went to the rear of the apartment and I engaged Mrs. Marshall in some purely social conversation.

After a wait of perhaps five minutes, Mr. Marshall appeared, he had his coat on, he had a flashlight in his hand, requested that I accompany him outside the building to put his car away. I told Mrs. Marshall good night, that I would see her when I got back and left the apartment with Mr. Marshall.

We went out into the courtyard of the apartment house and as soon as we gained this courtyard he handed me two glass, prescription-type viles, (sic) one containing some more of the yellow tablets and another containing some yellow capsules.

I placed these in my pocket and asked Mr. Marshall how much he wanted for them and he stated that he wanted $15 so, I paid him for these in cash. After some lengthy conversation of a purely social nature I left him standing on the sidewalk, walked across the street, got in the car and drove off.

The Court: I think at this time we will take a 15-minute recess.

Ladies and gentlemen of the jury, you will bear in mind that you should not discuss the evidence in this case until you have heard all the evidence and the arguments of counsel and the instruction of the Court and retire for your final deliberation.

Also, of course, you should not talk to any other person about the case nor permit anyone to talk to you about the case. So, you bear those admonitions in mind, not only this recess but any subsequent recess in the case.

After Recess.

The Court: You may proceed.

Mr. Perrill: Thank you, your Honor.

Q. Inspector Keating, prior to recess you had just told us that you had left the defendant Marshall and had pro-[fol. 17] ceeded to your automobile, I believe. Would you continue from there, as to what you did?

A. Yes. After leaving Mr. Marshall I entered the car and drove away several blocks and examined the two prescription-type viles (sic) he had supplied me. As I have already described, one contained some yellow tab[illegible] and there were 50 of them, and, again, they were the yellow-colored, round-shaped tablets with the score of depression or groove running across the width, and in the other vile (sic) I found 24 small, yellow capsules.

These yellow capsules were returned to the vile (sic) and the vile (sic) placed in a small, white paper envelope and sealed and I then applied an official United States Food and Drug Administration seal, No. 58-801M, signed with the date, 5-1-56, and my name, Robert E. Keating.

The 50 tablets were returned to their original container, this prescription-type vile (sic) was also placed in another white envelope and sealed and an official United States Food

and Drug Administration seal with No. 58-802M, the date, 5-1-56, and my name, Robert E. Keating, placed thereon.

I kept these two samples in my possession throughout the evening and on working hours the next morning I submitted them to the laboratory, United States Food and Drug Administration, New Customhouse, in Denver, Colorado.

(Envelope marked Government's Exhibit No. 2 for identification.)

Mr. Perrill: Let the record show I have broken open the envelope that has been marked for identification as Government's Exhibit 2 and removed therefrom a white envelope.

Will you mark that 2-A?

(Envelope marked Government's Exhibit No. 2-A for identification.)

Q. I hand you what has been marked for identification as Government's Exhibit 2-A, which I have heretofore removed from what has been marked for identification as Government's Exhibit 2, Inspector Keating, and I ask you what that is?

A. This is the envelope that I have previously described [fol. 18] as containing the sample 58-805M.

Mr. Perrill: Let the record show I take from what has been marked for identification Government's Exhibit 2-A, a small vile. (sic) I ask you to mark that Government's Exhibit 2-B.

(Vile (sic) marked Government's Exhibit 2-B for identification.)

Mr. Perrill: Let the record show I remove from what has been marked for identification purposes as Government's Exhibit 2, a small vile (sic) which I ask you to mark as Government's Exhibit 2-C.

(Vile (sic) marked Government's Exhibit 2-C for identification.)

Mr. Perrill: Let the record show I remove from what has been marked for identification Government's Exhibit 2, a small bottle which I request you to mark Exhibit 2-D.

(Bottle marked Government's Exhibit 2-D for identification.)

Q. Inspector Keating, I hand you what has been marked for identification purposes as Government's Exhibit 2-B. I ask you to tell me, if you know, what that is.

A. Well, I don't recognize this, sir. This is something that was done by someone else after I turned the sample in. This appears to be the yellow capsules of the type I obtained.

The Court: You needn't express an opinion unless you can identify it.

Q. Now, I hand you what has been marked for identification as Government's Exhibit 2-C, and I ask you, if you know, what that is?

A. No, sir, I don't recognize this vile (sic) either.

Q. I hand you what has been marked for identification purposes as Government's Exhibit 2-D. I ask you if you [fol. 19] have seen that before?

A. No, sir, I don't recognize this either.

Mr. Perrill: All right, sir. May I have a moment, your Honor?

Q. Inspector Keating, I hand you what have been marked for identification as Government's Exhibits 2-B, 2-C and 2-D, and I ask you to open first what has been marked Government's Exhibit 2-B and examine the contents thereof, and state whether or not you know what the contents are?

The Court: He stated he didn't know what the exhibits were.

Mr. Perrill: He said he couldn't——

The Court: He said he couldn't identify the exhibits.

Mr. Francis: That was my understanding.

Mr. Perrill: I handed him the bottles, he said he couldn't identify the bottles.

The Court: You asked him what the exhibit was and he said he couldn't identify it. The record will speak for itself if I am not mistaken.

Mr. Perrill: In that case, I would like to be given an opportunity to examine the defendant as to what it is with respect to the exhibits that he cannot identify.

Mr. Francis: I don't understand that.

The Court: I don't know where we are getting but I observe from here the contents is what you are asking him, what the contents are, how can they be identified, if I got five tablets, these are the five tablets I got from some other identification.

Mr. Perrill: The witness may say they appear to be the same.

The Court: You may proceed and you may object properly. He testified he put the tablets in a certain envelope and there is no showing how they got in the other place. [fol. 20] He has testified that he placed the tablets that he got and capsules in an envelope, didn't he?

Mr. Perrill: Yes, sir. I think he further testified that he placed them in two viles (sic) and then placed those in an envelope.

The Court: You said he couldn't identify the viles. (sic)

Mr. Perrill: My recollection is he didn't testify as to the contents. I simply wish to ask him whether the contents of the respective viles (sic) appear to be the same.

The Court: Is it just a guess or can he? I expect it goes to the weight of his testimony. Go ahead, and you can object. I don't quite understand what you are trying to do.

He has already testified he couldn't identify those exhibits.

Mr. Perrill: Well, your Honor, the witness has testified that he couldn't identify the exhibit as, of course, as it is constituted now. I would simply like for him to inspect the contents closely and have him testify that——

The Court: I don't know how he is going to identify a tablet unless there is some identification. You can go ahead for your record.

Q. I hand you what has been marked for identification Government's Exhibit 2-B. I ask you to open that and in-

spect the contents and tell me whether or not you have seen them before?

Mr. Francis: I object to that question,——

The Court: Well, go ahead.

Mr. Francis: —on the grounds that he has already testified that he cannot identify the particular exhibit.

The Court: I think I will let him answer the question. [fol. 21] The big question is when we come to the admissibility in evidence.

A. Well, as to these actual ones before, I couldn't say, they appear to be the type I purchased.

Q. The ones you testified about?

A. Yes.

Q. Handing you what has been marked for identification Government's Exhibit 2-C, I ask you to inspect closely the contents of that object and tell me whether you have seen these before?

A. I would have to answer this question, the same ones, they appear to be the same type I purchased from the defendant on May 1st.

Q. Now, I hand you what has been marked for identification as Government's Exhibit 2-D, and I ask you to examine the contents thereof and tell me whether or not you have seen those before?

A. My answer to this question would be the same again. As to whether or not these are the actual capsules, I cannot say, but they appear to be of the same type as those purchased from the defendant on May 1st, 1956.

(Envelope marked Government's Exhibit 3 for identification.)

Mr. Perrill: Let the record show that I have in my hand what has been marked for identification as Government's Exhibit 3, the same being a larger white envelope, and let the record further show that I break the seal as to said envelope and I remove therefrom a smaller white envelope which I ask to be marked Government's Exhibit 3-A.

(Envelope marked Government's Exhibit 3-A for identification.)

Q. Inspector Keating, I hand you what has been marked for identification as Government's Exhibit 3-A, and I ask you to tell us, if you know, what that is.

A. Yes, I do.

[fol. 22] Q. Tell us what it is.

A. This is the envelope in which I placed the vile (sic) of the 50 yellow tablets that I have previously described as being purchased from the defendant on the evening of May 1st, 1956, and this vile (sic) here.

Mr. Perrill: Just a moment. Let the record show the witness has removed therefrom a vile (sic) which I ask be marked Government's Exhibit 3-B.

(Vile (sic) marked Government's Exhibit 3-B for identification.)

Q. Now, I return to you what has been marked for identification as Government's Exhibit 3-B, and continue with the conversation referring to the identification of what has been marked Government's Exhibit 3-B, as such.

A. Yes, I removed it from the envelope and find that it is the vile (sic) that I placed in this envelope on that occasion.

Q. How do you know that?

A. Because of the type of prescription container that it was. It's a heavy, glass-type container with a white, plastic lid that I recall as being placed in this envelope by me on that date.

Q. All right, continue. What did you do with what has been marked as Government's Exhibit 3-B?

A. It was placed in this envelope by me on the evening after leaving Mr. Marshall's apartment and the envelope sealed and the official United States Government seal, dated 5-1-56, No. 58-802M, and my name, Robert E. Keating, was placed on it.

Q. Now, I ask you whether or not you are referring to what has been marked as Government's Exhibit 3-A, as that envelope?

A. I am. I kept this in my possession and submitted it to the Denver District Food and Drug Laboratory the following morning.

[fol. 23] Mr. Perrill: One moment, please, your Honor.

Q. Again, Inspector Keating, I hand you what has been marked for identification as Government's Exhibit 3-B, the same appearing to be a vile, (sic) and ask you to open and inspect the contents and tell me, if you know, what the contents are?

A. There are some round, yellow, scored tablets.

The Court: The jury can see that. See if he knows what they are. Anybody can see what they are; I mean, that they are round, yellow tablets.

A. As to what they are, I don't have the knowledge, I don't feel qualified as to pass on what they are.

Q. I ask you whether you have seen them before?

A. Yes, as I have already described that this type of tablets was in the vile (sic) when I received it and the vile (sic) is familiar to me because of its construction and it was placed by me in this envelope.

Q. What did you do with this envelope?

A. I sealed it up and turned it in to the laboratory.

Q. By that you mean what has been marked as Government's 3-A?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. Now, Inspector Keating, I hand you again what has been marked as Government's Exhibit 2-A. Would you state for us——

The Court: He has already testified that that was the envelope that he put these other items in and gave to the laboratory.

Mr. Perrill: I wasn't sure I had covered that.

The Court: You have testified to that, Mr. Keating?

The Witness: Yes.

[fol. 24] Mr. Perrill: That is my error, your Honor. I withdraw the question.

Your Honor, at the risk of repetition——

Q. Referring to what have been marked as Government's Exhibits 1-A, 2-A and 3-A, which I herewith hand to you, I ask you whether or not your seal appears on each of these exhibits?

The Court: Well, he has testified to that. The Government is not entitled to keep repeating the same testimony. If there is any question about it, look at the record. The thing is so confused already. Ask him if he has already testified about that.

Mr. Perrill: Well, again, your Honor, it is a matter of recollection.

The Court: Well, go ahead and ask him whatever question you wish to ask him.

Q. I ask you whether or not the three envelopes, Government's Exhibits 1-A, 2-A and 3-A, whether you recognize your seal on these respective envelopes?

A. Yes, I do.

Q. And how do you recognize these respective seals?

A. Because they bear my handwriting, my name, the sample numbers and the date applied by me personally when the samples were made up.

Q. All right, sir, thank you. Inspector Keating, referring to your previous testimony as to all capsules and tablets you stated you received from the defendant, I ask you whether or not you had a prescription for any of these?

A. I did not.

Q. I ask you whether or not there was any discussion between yourself and the defendant concerning this matter of a prescription?

A. There was no discussion.

Mr. Perrill: Your witness.

[fol. 25] Cross-Examination.

By Mr. Francis:

Mr. Francis: If the Court please.

Q. Now, Mr. Keating, when is the first time you had any dealings with the defendant as regard any capsules or tablets?

A. On the evening of April 23, 1956.

Q. You recall at a previous time testifying under oath that you had some dealings with the defendant on April 24, 1956?

A. Yes, sir. On that occasion it was a mis-statement of the date by me.

Q. And the correct time then is April 23, is that so?

A. Yes, sir.

Q. Now, on April 23 you testify that you received some objects in a tissue-paper container, is that correct?

A. That is correct, sir.

Q. And you have already identified that in Court this morning, is that not so?

A. Yes, sir.

Q. You testified at the same time that those objects, whatever they were, were in that tissue-paper-type package, and also wrapped with a rubber band, is that not so?

A. Yes.

Q. Where is that rubber band?

A. I discarded it.

Q. You are absolutely sure there was a rubber band?

A. Yes, sir.

Q. Why is it you discarded it?

A. It being too small to identify, and I felt that it didn't add materially or distract (sic) materially either its presence or absence, and I merely discarded it.

Q. You could have placed it in the envelope as easily as you did the tissue paper that you had, could you not?

A. Oh, yes, I could have.

Mr. Perrill: Could you speak up just a little bit, Inspector Keating?

[fol. 26] Q. On April 23rd, that was the second time you had seen the defendant Mr. Marshall?

A. Yes.

Q. And at that time you told him that you wanted some stay-awake pills?

A. That's right.

Q. And he told you you should have a prescription for pills of the kind you wanted, did he not?

A. No.

Q. Do you recall clearly your entire conversation that evening with respect to pills or stay-awake pills?

A. Yes. I had asked him for these stay-awake pills, as you mentioned, and without any reference to a prescription at all, he said that I should use No-Doz and drink coffee.

Q. And you answered that No-Doz and coffee would not work?

A. Well, I told him that I had used something which I felt was the same thing. I felt I had used this before and it hadn't produced the desired effect.

Q. Had you actually used No-Doz and coffee for what you had in mind?

A. You mean previously?

Q. Yes, sir.

A. No.

Q. How were you dressed at the time you went to see Mr. Marshall on April 23rd?

A. I had on some slacks and a sport shirt and a jacket.

Mr. Wham: If the Court please, I think this all is immaterial unless the defense intends to raise——

The Court: I don't know what you intend to raise. I will overrule the objection. He has a latitute (sic) about how he was dressed. The objection is overruled and you can answer the question.

A. (Continuing) I was wearing some slacks and a sport shirt and a jacket.

Q. And you told him your occupation was a salesman of some sort?

A. Yes, I did.

Q. Were you a salesman?

A. No, I wasn't.

[fol. 27] Q. And you told him you were going to go to Texas?

A. Yes, that is right.

Q. Were you going to go to Texas?

A. No, sir.

Q. Did you go to Texas?

A. No, sir, not at that time I didn't.

Q. Did you tell him you needed these pills,——

A. I told him——

Q. —the stay-awake pills?

A. I told him I wanted to use them to help me drive to Dallas that evening.

Q. In other words, you told him that you were sleepy or would need them because of your need to stay awake?

A. No, I told him I wanted to use them driving to Dallas. I asked him if he could get me stay-awake pills to drive to Dallas.

Q. You told him you needed stay-awake pills, is that not so?

A. I asked him if he could get me some.

Q. Did you tell him you needed some?

Mr. Wham: If the Court please, I object to that unless they are raising the question of entrapment.

The Court: He has testified to what he said. You needn't pursue that further. He has answered the question several times. That will be a question for the jury to pursue.

Q. First, the second time you went there, did you go with Mr. Anderson, Mr. Robert Anderson?

A. Now, we are referring to the evening of April 23rd?

Q. Yes, sir.

A. No, sir, I went alone.

Q. You had previously gone with Anderson, is that correct?

A. That is correct.

[fol. 28] Q. And he introduced you as a salesman of some kind?

A. Actually he introduced me as a friend of his.

Q. I see. And then you introduced yourself as a salesman?

A. That's right.

Q. And then as I recollect you stated that you and Mr. Marshall discussed the best routes to drive to Texas and that he produced some maps?

A. A map.

Q. A map?

A. Yes, sir.

* * * * * * *

The Court: I think we will recess now until 1:30, and ladies and gentlemen, you will bear in mind the admonitions I have given about not discussing the case until you have heard all the evidence and retire to the jury room and also, of course, you should not talk to anyone about it or permit anyone to talk to you about it.

* * * * * * *

[fol. 54] The Court: We may as well recess until tomorrow morning at 9:30. You will observe during this recess the observations I have made about the impropriety of discussing the case among yourselves until you have heard all the evidence, or letting anyone talk to you.

So, with those admonitions, you may announce a recess until 9:30 in the morning.

* * * * * * *

In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Francis: There was a matter I wanted to bring up before Court opened, that is that there are two articles in the newspapers, onein (sic) yesterday afternoon's Denver Post, and the other in this morning's News, both of which describe the past criminal record of this defendant. I noticed when I came in this morning, as I walked by the jury room, that jurors had several Rocky Mountain News and were huddling around reading it.

[fol. 55] I would like to determine whether or not the jurors have been reading the articles in question. I believe the Court has admonished them not to do so.

The Court: I saw the articles, and where did the information come from?

Mr. Wham: As far as I know, your Honor, on the past record, I don't have any information.

The Court: The intimation is from the—could be that it must have come from the Government. They couldn't have gotten it without getting it from the Government. That is my first thinking.

Mr. Wham: I know this much about it, Judge. I don't know anything about the article that appeared in the Denver Post. As to the article in the Rocky Mountain News, I was called last night by Al Nakkula before I left the office.

He told me they had a request from Oklahoma for some information about the trial, asked me to tell him what happened at the trial, that he wanted to relay it down to Oklahoma.

I told him what appears in the first and second paragraphs, about Robert Keating's testimony and Don Taylor's testimony.

I didn't tell him anything about the Defendant's past record. Now, he did ask me, after I told him that, about a magazine article that appeared in Coronet Magazine that he said had something to do with the Defendant's prescribing some drugs for this Hank Williams. I told him I had not read the article and didn't know anything about it.

Mr. Hardey: Mr. Ralph Horst, Chief of the Denver District Food and Drug Administration, tells me he got a telephone call from a reporter asking for information regarding the Defendants past convictions and that he told the reporter that he could not make any comment about this matter during the course of the trial, that he gave him absolutely no information. That is as far as I know about it. [fol. 56] I personally have not seen a reporter and have given no information at all.

The Court: Would you have any information about it?

Mr. Perrill: I don't, your Honor, I was not contacted relative to—by the newspapers.

The Court: As all of you know, we have had once or twice in the past something that has occasionally—an episode like this, and that sometimes it came from something the District Attorney had said or something of that sort, and I didn't feel that any counsel would give this information.

That was my feeling, but it did seem by the nature of it that it must have been obtained from somebody—well, that had considerable information about the case.

Now, it may be that there has been enough publicity in Oklahoma that they have related the information up here. It wasn't something that an ordinary reporter knows unless somebody told him. On the prior convictions, both of them mentioned that. That would only be available to a reporter through quite a bit of research and checkup. Somebody must have told him.

Mr. Perrill: One of the convictions was an Oklahoma conviction.

Mr. Wham: Two of them.

Mr. Hardey: There is this possibility, that this mandid (sic) go to trial in Oklahoma on second offense, and the Oklahoma District Attorney may well have gathered that information in preparing for the trial.

That is just a speculation. The reporter might have gathered the information.

The Court: One of the convictions, according to the—that is the Post article—was that he was convicted of forgery in Oklahoma.

Mr. Hardey: That was an Oklahoma offense.

[fol. 57] The Court: The article in the newspaper says he has a record of two felony convictions and then they recite, "1953, while serving a forgery sentence in the State Penitentiary, he testified before State Legislative Committee studying new drug laws for Oklahoma."

The thing about him giving the drug to Hank Williams would be the dangerous one. The fact that he testified before a legislative committee wouldn't be very prejudicial.

Mr. Hardey: There are two Oklahoma convictions, one for forgery and one of illegal possession of barbituates.

The Court: Was that a felony?

Mr. Hardey: Yes.

The Court: The only thing that is identified is a forgery in both of them. I don't know, I expect the only thing to do is possibly interrogate the jury about whether they have read it and whether having read it they think they can go ahead and render a fair and impartial verdict.

If they answered they couldn't give him a fair trial or something of that sort—I don't know whether the jury better be interrogated in the Courtroom all together or brought in here one by one, I don't know.

Mr. Wham: This is the first time I have ever run up against this situation.

Mr. Hardey: I have had it happen once before in St. Louis.

The Court: How did it happen there, how did they do there?

Mr. Hardey: The jury was reading the newspaper in the jury box during the noon recess and the defense attorney raised a question when the Judge came in and the Judge tore into the jury with vigor.

The Court: Sometimes I do. I never anticipated it, that [fol. 58] this case would have any newspaper publicity at all. The case that you could anticipate that you could have publicity would be a murder trial, but I generally tell the jury to not read the newspapers or not listen to any tele-

vision broadcasts, but it never occurred to me that this case would get any newspaper publicity and, of course, I didn't tell them that.

I mean, the jury is not quite in the same fix as if I had told them not to read the newspapers, but without any warning on my part along that line, they may have read the paper, and I think the question now is whether this has been sufficiently prejudicial that they could not proceed to determine the verdict from the evidence and what they hear at the trial and disregard this entirely.

A good many times on account of prejudice, this, that and the other thing, on account of a prejudicial account, most fear that. It is amazing how many people haven't read the newspaper.

On the case I just mentioned, the Smalldone cases had as much publicity as has ever been tried here. My memory is that three-fourths of the panel had read nothing but the headlines.

Mr. Hardey: The Judge polled each member of the jury in the box on whether they had read the newspaper and when they said they had read it, whether it would prejudice them and if they could give them a fair trial.

The Court: We can do it that way or do it one by one. My memory on it is and most of my experience on this line has been where there is change of motion on account of the feeling in the community. I think that some of those cases they brought the jury in one by one and interrogated them about the thing.

Mr. Francis: My position would be that I would prefer the individual interrogation of the jurors by the Court in chambers.

The Court: Well, I think we may as well do that. You can bring another chair in, Clarence, and then just go and ask the juror to come in. Start with the number one juror. [fol. 59] There is no necessity of putting them under oath. I think we will just interrogate them.

(The Court interviewed jurors in chambers)

The Court: Do you have any comments to make, anyone, about the situation?

[Clerk's Note: Supplemental record containing the questions to jurors and their answers appears at page 39].

Mr. Francis: I would like to put in a motion——

The Court: All right.

Mr. Francis: —for a mistrial.

The Court: You wish to make a motion for mistrial?

Mr. Francis: Yes, sir.

The Court: All right. I think the motion will be denied. I am satisfied with the interrogation of the jurors—there were only about four of them had read the article in the newspaper—all of them satisfied me they would not be influenced in any way about the item, could proceed and render a fair and impartial verdict from the evidence and the law in the case.

I think the signs of the jurors was very apparent from their answers and their demeanor while they were here, and I feel very confident in my own mind that the matter having been called to their attention, that they will lean over backwards, as a matter of fact, in consideration of the case to stay away from any extraneous matter they may have read or heard or anything else.

Of course, I propose when the instructions come, to reiterate that they should not give any consideration to anything they have read or heard or anything else and should confine their consideration solely to the evidence.

I think the jury was not prejudiced in any way or impressed, as a matter of fact, by the article. I feel that there will be no prejudice of the defendant for the pro-[fol. 60] ceeding of the trial. The motion will be denied.

Mr. Francis: Will the newspaper items be part of our record?

The Court: Yes, I was just going to give those to the Clerk. I tell you what we better do. I was thinking about some way of marking them, but I wouldn't want to get them tangled up with the trial exhibit numbers.

I think it is perfectly evident that the articles were handed to me by counsel. The Denver Post, "Trial Opens On Sale Of Restricted Drugs." The one in the News, "Jury Selected To Try A Man On Drug Charge."

So, those articles, or the items that counsel has handed me, will be placed in the record. I think they are sufficiently identified by this description. All right, you can put them

in the file, Clarence, if you can fasten them together. Is there anything else?

Mr. Francis: No.

The Court: Let's figure on going ahead as quick as we can all get in there.

In Open Court

The Court: All right, the Government may proceed.

Mr. Wham: Thank you, your Honor. I would like to call Mr. William V. Eisenberg, please.

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[fol. 83] Robert E. Keating, a witness recalled by the Government, having been previously sworn, resumed the stand and testified further as follows:

Redirect examination.

By Mr. Perrill:

Q. Are you the same Robert E. Keating who previously testified in this case, I believe it was yesterday?

A. Yes, sir.

Mr. Francis: May the record show an objection on the part of the defendant upon this witness testifying?

The Court: The objection will be overruled for the reasons just given in chambers.

All right, go ahead.

Q. Inspector Keating, just referring your attention to a segment of your testimony yesterday, you stated that on May 1st, 1956, you received 24 capsules from the defendant which were in a bottle?

A. Yes.

Q. Now, subsequent to receiving these capsules in the condition as you have stated, what, if any, report did you have occasion to make?

A. I wrote out an official Food and Drug Administration Collection Report on the morning following the purchase of these drugs.

Q. Where were you at the time of making that report?

A. I was in the Denver District Office of the Food and Drug Administration.

Q. Now, exactly where, if you could state?

A. In the inspectors' room, at my desk.

Q. All right, sir, with relation to where you were at that time, making your report, if you know, where was this bottle containing the 24 capsules that you received [fol. 84] from the defendant as you testified?

A. I had this bottle before me on the desk as I prepared this collection report.

The Court: Let's get this straight. I thought—when did you submit this bottle? You better name this thing, what he did, by exhibits. Go ahead, but it means nothing unless you tie it up.

Mr. Perrill: I will just as soon as I can.

Q. I ask you whether or not you have reviewed this report since testifying in this case yesterday?

A. Yes, I have.

Q. I ask you whether or not reviewing the report has refreshed your recollection with respect to what has been marked for identification as Government's Exhibit 2-D?

A. Yes, it has. The bottle that you have handed me here, Government's Exhibit 2-D, is of the type described by me in the body of this collection report that I have referred to and it's described by me on this report as being a small, asprin-type (sic) bottle.

Mr. Perrill: Just a moment, your Honor, I am trying to think of a word.

Q. Of what degree of clearness, if you can recall?

A. As to the wording of the report, is that what you are referring to?

Q. No, to your recollection?

A. Yes, the report that I reviewed was made by me on May 2, 1956, and since reviewing that report it has recalled to my attention the fact that this bottle appears to be the same one I have described in this report and is the one I have submitted under this sample number 58-801M.

Q. All right, now, and as being of what origin as far as the first time you ever saw it?

A. The origin of this bottle was the defendant Mr. Marshall. This is the bottle that I purchased from him on the evening of May 1st, 1956.

Q. Containing what?

A. Containing a number of yellow capsules, 24 to be exact.

Q. And what did you do with what has been marked for identification Government's Exhibit 2-D?

[fol. 85] A. I placed this in an envelope and sealed it with an official Food and Drug Administration seal. Now, the number that I inscribed on this seal was taken from this collection report, 58-801M, and this number appears both on the collection report and on the envelope which was sealed by me. The seal also bears this same number and my name.

Q. Now, I hand you what has been marked for identification purposes as Government's Exhibit 2-A. What, if any, recollection does this proposed exhibit have to do with what you have in your mind, what has been marked for identification Government's Exhibit 2-D?

A. Well, this envelope, which has been marked as Government's Exhibit 2-A, is the envelope that I prepared at that time and is the envelope which contained this small bottle which has been marked as Government's Exhibit 2-D, the one containing the 24 yellow capsules that I obtained on that evening.

Mr. Perrill: Thank you, sir.

At this time the Government offers into evidence Government's Exhibits 2, 2-A, 2-C and 2-D.

The Court: Put them up here so we can see. Counsel has a right to cross-examine. You can cross-examine. I'll reserve ruling until you cross-examine.

Mr. Francis: I would appreciate cross-examination on the exhibit, your Honor.

* * * * * * *

In Chambers

Motion for Verdict of Acquittal and Denial Thereof

The Court: At the conclusion of the Government's case the defendant as the record shows asked for a verdict of

acquittal on the ground of entrapment including other grounds as will appear from the record made the other day. The Court denied the motion for acquittal, and counsel for the defense has advised that the defense does not intend to interpose any evidence, and the defense has asked for an instruction on the defense of entrapment.

* * * * * * *

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: It seems to me under the case you offer [fol. 86] here that this evidence is not made admissible at all in any sense. There are really two questions involved here. The first is whether you have a right to offer any evidence at all under the circumstances here where the defendant has not taken the stand and where the defendant relies entirely on the testimony of the Government as showing the alleged entrapment. That case that you have just cited that I mentioned here a moment ago says the question is a very doubtful one. Let me see the case, will you, Mr. Francis?

The Court designates the question as one of an interesting nature and very doubtful, that is, with respect to the right to offer any evidence at all. In that case the Court did permit the evidence to be received which was to the effect according to the opinion that, I am quoting the opinion: "The government officers were then permitted to testify, over the defendant's objection, as to statements made by other addicts, prior to the time when the offense was committed, as to having purchased drugs from Siegel, and as to a previous attempt made by the officers to get evidence of a sale by Siegel."

As I understand from the offer of the Government, there is no evidence whatsoever that this defendant ever dispensed without a prescription any of these drugs in this category to anyone. The gist of the Government's offer would seem to be directed to the fact that he was holding himself out as a physician and things of that sort. If the trial was on the issue of his having claimed to have been a physician and the charge against him was he was practicing medicine without a license, there might

be some pertinency to that evidence, but as the matter stands the effect of the evidence would be it would not reflect on the question of entrapment, because there is no showing whatsoever of any similar transaction or one here under consideration but simply the charging of the defendant on some other angle.

It would be just like offering evidence that he picked pockets or was a petty thief or something of that sort which would have no bearing on the issue and would tend to raise a collateral issue and I think would be prejudicial to the defendant. As I understand it, and I will ask counsel for the Government so there will be no mistake, there is [fol. 87] nothing in this evidence whatsoever that relates to an alleged dispensing by this defendant of any drugs or articles of the type involved in this case at all, is there?

Mr. Wham: Well, not of the exact same description, no, Judge. We feel, however, that the circumstances showing the practice in Oklahoma, which included the dispensing of drugs admitted by the defendant together with the circumstances here showing the defendant's access to a supply of drugs through a drugstore, which he was interested in, show that the agent had reasonable cause to suspect that the defendant may be engaged in criminal activities here.

The Court: There was no showing at the time this trial happened that he had any connection with the drugstore at all than what you offer. That was clear back a couple of years before, was it?

Mr. Francis: I would not. That is all one instruction?

The Court: Yes.

Mr. Francis: The defendant objects and excepts to the instruction as submitted by the Court on one ground, namely, that interstate commerce involves more than the proof or the showing that a drug was manufactured outside of this jurisdiction, and, therefore, that the instruction should properly state that the Government must prove beyond a reasonable doubt the course of travel of the drug, namely, how it came from New York to Colorado. Secondly, the defendant objects and excepts to the instruction in defining dispensing to mean or to including misbranding re-

stating that objection to the notion that the mere dispensing of a drug is misbranding.

The Court: Of course, the statute so provides with respect to the matter. With respect to the first I think the cases are very much in avcord (sic) that the Government doesn't need to show the means of the transportation, the routes or the details of the transportation, that any of these cases involving transportation in interstate commerce all [fol. 88] we have to show is that the item was in a different state and then later showed up in another state. There are a lot of cases holding that way.

EXCERPTS FROM COURT'S INSTRUCTIONS

Now, the statute provides that the act of dispensing this kind of a drug without a doctor's prescription is an act which results in the drugs being misbranded while held for sale. Congress has so defined misbranding. You must as a matter of law accept this definition of misbranding.

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You are instructed that the word "dispensed" as used in the statute and in this information means to deal out or divide out generally either with or without a money consideration. It means the one who has potential ownership or control voluntarily parts with such ownership or control. Thus, in this case in order to find that the defendant dispensed the drug to Robert E. Keating you must find beyond a reasonable doubt that the defendant was in possession, ownership, and control of the drug and voluntarily parted with such possession, ownership, and control by dealing out the drug to Robert E. Keating.

Those are the first two elements. Now, the third element, and there are three elements in the offense, is that you must also find beyond a reasonable doubt in order to return a verdict of guilty that the drugs involved had been shipped in interstate commerce prior to their being dispensed by the defendant. In determining whether they have been shipped in interstate commerce I instruct you that, if you find that any of these drugs had been manufactured outside of the State of Colorado, then they had been shipped in

interstate commerce prior to the time of their alleged dispensing by the defendant.

* * * * * * *

Now, the defendant's counsel, as you have noted from his argument, as an alternative ground for acquittal claims [fol. 89] there was an entrapment in this case. Now, entrapment is defined as the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. In other words, when the criminal design originates not with the accused but is conceived in the minds of the Government officers and the accused is by persuasion deceitful representation or inducement lured into the commission of a criminal act the Government is estopped by sound public policy from prosecution therefor, and an acquittal is warranted if the jury so believe or have a reasonable doubt with respect thereto. It is well settled, however, that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution as artifice and strategem, and decoys may be employed to catch those engaged in criminal enterprises and to present opportunity to one willing to commit crime. If such is the case, the jury is entitled to reject the defense of entrapment and find the defendant guilty if convinced of his guilt beyond a reasonable doubt.

* * * * * * *

In United States District Court

Order for Inclusion, Certification and Transmittal of Supplemental Transcript—January 30, 1958

This matter coming on upon the stipulation of the parties hereto for the inclusion of a supplemental transcript of record concerning proceedings in the trial of the above case on September 26, 1957; it appearing to the Court that said supplemental transcript is limited to a report of the Court's interrogation of jurors *in camera* concerning their knowl-

edge of certain newspaper articles reporting said trial, and the Court being fully advised in the premises,

It is hereby ordered that the Clerk of the Court certify [fol. 90] and transmit said supplemental transcript to the United States Court of Appeals, Tenth Circuit, for inclusion in the record on appeal.

Dated at Denver, Colorado, this 30 day of January, 1958.

William Lee Knous, Chief Judge, United States District Court.

Filed January 30, 1958

Supplemental Transcript of Proceedings of September 26, 1957

Excerpt of Proceedings had before Honorable William Lee Knous, Chief Judge, United States District Court, District of Colorado, and a Jury, in Denver, Colorado, at the Post Office Building, in Courtroom A, on September 26, 1957, at 9:30 o'clock a. m.

APPEARANCES:

Honorable Robert S. Wham, Assistant United States Attorney, Honorable James C. Perrill, Assistant United States Attorney, District of Colorado, and Leonard Hardey, Esq., Attorney, Food and Drug Administration, appearing for the Government.

George J. Francis, Esq., Attorney at Law, 817 Farmers Union Building, Denver, Colorado, appearing for the Defendant.

EXAMINATION OF JURORS IN CHAMBERS

(Dorothy T. Cleland, Juror No. 16, entered the Court's Chambers.)

The Court: This is no interrogation or anything of that sort, Mrs. Cleland. It appears that there was a piece in the Post last night about this case and also one in the News this morning. Did you happen to read either one of these pieces?

[fol. 91] Mrs. Cleland: No, I didn't. I heard just now that there was a piece but I haven't gotten to the papers.

The Court: You didn't read either one of the papers?

Mrs. Cleland: No.

The Court: From what you heard, was anything said about any of the contents of it?

Mrs. Cleland: No.

The Court: That is all I want to ask you about it.

Mrs. Cleland: All right.

(Dorothy T. Cleland, Juror No. 16, left the Court's Chambers.)

(Clarence Gomer, Juror No. 29, entered the Court's Chambers.)

The Court: Mr. Gomer, it appears that last night in the Post and this morning in the News there were a couple of news items about this case. Did you read these news items, either one of them?

Mr. Gomer: Just a few minutes ago I read this one item in the News.

The Court: Well, now, from what you read in the News about the case, would you be in any way influenced in your consideration or by what you read in the News?

Mr. Gomer: No, sir.

The Court: You feel sure in your own mind that you could determine the case on the evidence you hear in the Courtroom and not use any of the information in this News item in determining the guilt or innocence of the defendant?

Mr. Gomer: Yes, sir.

The Court: You are sure of that?

Mr. Gomer: Yes, sir.

[fol. 92] The Court: Do any of you want to ask any questions?

Mr. Perrill: I wonder whether or not the Court would want to instruct each juror not to discuss the article or its contents as they go back?

The Court: Yes, I think that is proper but I thought I would give them that in the general instruction, not to give consideration to that, but, of course, you shouldn't discuss among yourself anything about this article.

Mr. Wham: I wonder if it might not be in order to instruct or ask each juror if he can discard entirely from his mind——

The Court: That is what in effect I asked him.

You can discard it from your mind and make your determination solely from the evidence you hear from the witness stand?

Mr. Gomer: Yes, sir.

Mr. Francis: I wonder if I might inquire, were you in any way affected so far as your feelings toward Mr. Marshall were concerned, by the article?

Mr. Gomer: No, sir, hardly.

Mr. Hardey: You recognize, of course, that newspaper articles are frequently untrue and not verified and do not necessarily reflect true facts?

Mr. Gomer: Yes, sir.

Mr. Hardey: It might well be the situation here, might it?

Mr. Gomer: Yes, sir.

The Court: Thank you, Mr. Gomer. Mr. Pennington next.

(Clarence Gomer, Juror No. 29, left the Court's Chambers.)

[fol. 93] (Haskell O. Pennington, Juror No. 53, entered the Court's Chambers.)

The Court: Morning, Mr. Pennington, sit down. We are just checking up about a couple newspaper articles that appeared in last night's Post and this morning's News. There were a couple of news items about this case that is on trial right now. Did you read either one of those articles?

Mr. Pennington: Nos, (sic) sir, I didn't.

The Court: Has anyone discussed the items with you, any of the other jurors?

Mr. Pennington: No, sir.

The Court: No one has mentioned to you what was said in the articles or anything of that sort?

Mr. Pennington: No, sir.

The Court: All right, that is all we will want of you, thank you very much.

(Haskell O. Pennington, Juror No. 53, left the Court's Chambers.)

(Aletha May Bowers, Juror No. 11, entered the Court's Chambers.)

The Court: Morning, Mrs. Bowers, sit down. What we are inquiring about is a couple of newspaper articles, one appeared in the Post last night and one in the News this morning concerning the case that is on trial now. I wondered if you have read either one of these articles?

Mrs. Bowers: I didn't see the one in the Post but I did see the one in the News.

The Court: Did you read it this morning?

Mrs. Bowers: Yes, sir.

[fol. 94] The Court: Well, now, is there anything in the article that would prejudice you in any way against the defendant?

Mrs. Bowers: No.

The Court: And if you were to go ahead with the case and the matter is submitted to the jury, you could reach your verdict from the evidence you hear from the witness stand and instructions of the Court?

Mrs. Bowers: That is right.

The Court: And you wouldn't give any regard to what you read in this article at all?

Mrs. Bowers: No.

The Court: You feel confident it wouldn't enter into your figuring at all?

Mrs. Bowers: In fact, I didn't read it too good, I just scanned over it but I did see the article.

The Court: It raised no prejudice in your mind against the defendant?

Mrs. Bowers: No.

The Court: You feel confident you could decide the case and give it the same consideration as if you hadn't seen the article?

Mrs. Bowers: Yes, sir.

The Court: You could exclude from your mind anything you recalled about the article?

Mrs. Bowers: Yes, sir.

The Court: Do any of you wish to ask any other questions? Thank you, Mrs. Bowers. Mr. Sullivan.

[fol. 95] (Aletha May Bowers, Juror No. 11, left the Court's Chambers.)

(John William Sullivan, Juror No. 68, entered the Court's Chambers.)

The Court: Sit down, Mr. Sullivan. We are just inquiring about a couple of items that appeared in the newspapers about this case, one was in the Post last night and one was in the News this morning. I wonder if you read either one of these articles?

Mr. Sullivan: No, sir, we don't get the Post and I hardly ever read the News until I get home at night.

The Court: You didn't read——

Mr. Sullivan: No, sir, just hearsay that there was some article in the paper.

The Court: Did someone tell you that there were some articles?

Mr. Sullivan: No, sir, I just overheard a conversation there was something in the paper about it.

The Court: Did anyone tell you what the paper said?

Mr. Sullivan: No, your Honor.

The Court: From the talk you heard about it, did you form any or get any information about any factual information about the defendant or anything like that?

Mr. Sullivan: No, sir.

The Court: And you haven't any ideas, you don't know at this time even, what the article said?

Mr. Sullivan: No, sir, I never read the newspapers until evening.

[fol. 96] The Court: From what anybody told you——

Mr. Sullivan: No, sir.

The Court: —would there be any prejudice in your mind that would arise against the defendant?

Mr. Sullivan: No, sir.

The Court: Would there be anything that has happened in the way of any information you might have obtained from these hearsay sources that would be a thing that you would consider in reaching your verdict?

Mr. Sullivan: No, sir.

The Court: You would make up your mind what ought to be done from the evidence and from the instructions of the court?

Mr. Sullivan: Yes, sir.

The Court: Do any of you want to ask any questions?

Mr. Francis: May I ask——

The Court: Yes.

Mr. Francis: I would appreciate knowing the sources of this information; that is to say, you merely heard about it, was that in the jury room?

Mr. Sullivan: Coming down on the bus I heard somebody say something that sounded familiar to this case. Is that all?

The Court: Yes. Mrs. Baysdorfer.

(John William Sullivan, Juror No. 68, left the Court's Chambers.)

(Ruth Evalyn Baysdorfer, Juror No. 4, entered the Court's Chambers.)

[fol. 97] The Court: Sit down, Mrs. Baysdorfer.

I am inquiring about a couple of newspaper articles abut (sic) this case, one appeared in the Post last night and then there was one in the News this morning. Did you happen to read either one of these articles?

Mrs. Baysdorfer: Well, the one in the Post I didn't see at all and the one in the News, why, my husband saw it and told me about it and I scanned over it but I couldn't tell you now what the details of it were.

The Court: You don't have in your mind at this time the details of the article?

Mrs. Baysdorfer: No.

The Court: From what your husband told you, was there any feeling in your mind——

Mrs. Baysdorfer: The only thing——

The Court: —that would prejudice you against the defendant?

Mrs. Baysdorfer: The only thing he told me was that the jury had been selected and so many women and so many men and he said "I suppose this means you, this is the case you are on," and he didn't tell me anything further than that and he knew that I am not supposed to read

newspaper pieces and I glanced at the headlines of it and scanned it as I sometimes do and that was it.

The Court: The headlines just simply said "Jury Selected To Try Man On Drug Charge," that is all you saw?

Mrs. Baysdorfer: Yes, sir.

The Court: There is nothing in this experience, I assume from what you have said, that would prevent you from rendering a verdict on the facts as you hear them in the courtroom?

[fol. 98] Mrs. Baysdorfer: Oh, no.

The Court: You are absolutely sure there is nothing that has happened as far as you are concerned that would in any way influence you against the defendant or lead you to consider any of these matters in consideration of the disposition of the case?

Mrs. Baysdorfer: Oh, no, no.

The Court: Does anyone want to ask any further questions? All right, thank you Mrs. Baysdorfer.

(Ruth Evalyn Baysdorfer, Juror No. 4, left the Court's Chambers.)

(William Charles Wyatt, Juror No. 74, entered the Court's Chambers.)

The Court: Sit down, Mr. Wyatt. What we are inquiring about are a couple of newspaper articles, one which appeared in the Post last night and one of which was in the News this morning about this case that is on trial. Did you read either one of these?

Mr. Wyatt: I read both of them.

The Court: You read both of them?

Mr. Wyatt: Yes, sir.

The Court: Would there be anything in the articles that you read that would prejudice you in any way against the defendant?

Mr. Wyatt: I believe not, sir. I didn't really digest either one of them very thoroughly and I discussed the case with no one.

The Court: You know what we are trying to find out is whether there was anything in these articles that would in any way prejudice the defendant in your mind in the [fol. 99] case if the case went on or could you consider the

case in the same way you could have if you hadn't read the articles?

Mr. Wyatt: Yes, I believe I could.

The Court: You feel confident?

Mr. Wyatt: I believe I can honestly say that.

The Court: Could you lay out of your mind entirely what purported to be the factual statements in these items?

Mr. Wyatt: Well, yes, sir, because as I say, I didn't really digest them very thoroughly. I have very little time with the newspaper and in the case of both of these articles, I can hardly tell you what I really read in there, the case names, of course, including the defendant, but other than that I didn't pay too much attention to it.

The Court: As you read it and as you recall it, I gather from what you say, it hasn't formed an impression on your mind anything that would cause you to have an opinion as to how the case would be decided?

Mr. Wyatt: No.

Mr. Francis: Mr. Wyatt, you must realize my position as the defendant's counsel. You wouldn't be criticized if in any way your thoughts were influenced by what you read and if you feel in any way that the articles that you read had any effect on your opinions in the case, I would appreciate—that is to say, if your opinion had become absolutely adverse I would appreciate your stating it, that is to say, if you do feel in any way, no matter how slight a prejudice in this case, then I would appreciate your stating it. If not——

Mr. Wyatt: Well, now, I can only reiterate to you just what I have said to His Honor, that I don't feel that I [fol. 100] digested the articles very thoroughly, either one of them, and to me I read newspaper articles, at the time I think of what I am reading momentarily and then I go to something else and I have left it behind. It is almost like a piece of recreation and it is past and it is over with.

Mr. Francis: That is fine.

Mr. Wyatt: More than that I can't say.

The Court: I think you have answered the question. Thank you very much, Mr. Wyatt.

(William Charles Wyatt, Juror No. 74, left the Court's Chambers.)

(Albert Fenner Bullard, Juror No. 12, entered the Court's Chambers.)

The Court: Morning, Mr. Bullard. What we are inquiring about this morning, I have a couple of newspaper articles that appeared in the Denver papers, one last night in the Post and one this morning in the News about this case. I wonder, did you read either one of these articles?

Mr. Bullard: Yes, sir, I read both of them.

The Court: Did it raise any prejudice in your mind against the defendant?

Mr. Bullard: No, sir.

The Court: Is there anything in the articles that would influence you in any way in considering the case here, in rendering your verdict?

Mr. Bullard: No, sir.

The Court: You are very sure that you could go ahead and try the case and make up your mind what should be done from the evidence you hear from the witness stand and give no consideration whatever to these newspaper articles?

[fol. 101] Mr. Bullard: Yes, sir.

The Court: Do any of the rest of you want to ask him any questions? All right, sir, thank you, Mr. Bullard.

Mrs. Bush.

(Albert Fenner Bullard, Juror No. 12, left the Court's Chambers.)

(Hattie M. Bush, Juror No. 13, entered the Court's Chambers.)

The Court: Morning, Mrs. Bush, sit down. What we are inquiring about is a couple of newspaper articles that appeared in the newspaper, one last night in the Post and one this morning in the News about this case. Did you read either one of these articles?

Mrs. Bush: No, I don't recall seeing either of them. I glanced over the paper in the jury room but I concentrated on the Archina case.

The Court: You didn't see either one of them?

Mrs. Bush: No, sir.

The Court: Has anyone talked to you about either one of the items?

Mrs. Bush: No.

The Court: No one has mentioned it to you?

Mrs. Bush: No, sir.

The Court: No one said there was a piece in the——

Mrs. Bush: They have been chatting in the room where the jurors are now since they have been called in here but except for that, I haven't talked to anyone.

The Court: No one has told you what the article said or anything of that sort?

[fol. 102] Mrs. Bush: No.

The Court: All right, I don't think there is any further questions. Thank you, Mrs. Bush. Mrs. Bottinelli.

(Hattie M. Bush, Juror No. 13, left the Court's Chambers.)

(Chelsea Mae Bottinelli, Juror No. 10, entered the Court's Chambers.)

The Court: Morning, Mrs. Bottinelli, sit down right there. What I am inquiring about, Mrs. Bottinelli, are a couple of newspaper articles about this case, one of them appeared in the Post last night and one of them in the News this morning. Did you read either one of these pieces?

Mrs. Bottinelli: Yes, I did, I read the one in the News.

The Court: The one in the News this morning?

Mrs. Bottinelli: Yes.

The Court: Did anything you read in that item prejudice you in any way against the defendant?

Mrs. Bottinelli: No, I would try to be as fair as I could.

The Court: Would what you read influence you in any way in reaching a verdict on the case?

Mrs. Bottinelli: No.

The Court: You could lay that out of your mind entirely and decide the case on the evidence you hear from the witness stand?

Mrs. Bottinelli: The evidence I've got to understand is whether he sold the medicine, so that would have nothing to do from this.

[fol. 103] The Court: You would decide that from the evidence in the courtroom?

Mrs. Bottinelli: Yes, and not the rest.

The Court: You wouldn't have in mind this article you read in the newspaper whether he is guilty or innocent, is that right?

Mrs. Bottinelli: That's right.

The Court: Do any of you want to ask any further questions? All right, Mr. Francis.

Mr. Francis: I realize you want to be as fair as possible and certainly we would not have this jury if we didn't think every member was fair. Do you feel in your heart and without restraint that if you were in the defendant's position, that is to say, sitting where Mr. Marshall is sitting, and your own mind is as it is now as a result of having read the paper, that you could still feel that you could absolutely, impartially listen to the case and bring in a verdict?

Mrs. Botinelli: (sic) Yes, I think I could.

Mr. Francis: Fine, thank you very much.

The Court: Thank you very much. Mrs. Humphris.

(Chelsea Mae Bottinelli, Juror No. 10, left the Court's Chambers.)

(Pauline D. Humphris, Juror No. 34, entered the Court's Chambers.)

The Court: Good morning, Mrs. Humphris. What we are inquiring about in here this morning are a couple of articles that appeared in the Denver newspaper, one was in the Post last night and one was in the News this morning about this case. Did you read either one of them or both of them?

Mrs. Humphris: I didn't read it but I knew it was in the Post last night because my husband called my attention to it.

[fol. 104] The Court: Did he read it to you?

Mrs. Humphris: No.

The Court: Did you read it yourself?

Mrs. Humphris: No.

The Court: Was there any discussion about what the article said?

Mrs. Humphris: No, sir.

The Court: Then you have at this time no information about what is in the article?

Mrs. Humphris: No, I don't.

The Court: From what I gather there is nothing in the episode that your husband happened to mention that would in any way be a matter for you to consider in this case at all?

Mrs. Humphris: No, he just mentioned, "Was that the case you're on?" I said, "I guess it is," I didn't even pay that much attention to it.

The Court: Did anything happen in connection with this article that would raise any prejudice in your mind against the defendant?

Mrs. Humphris: No, sir.

The Court: Do you wish to ask any questions? Thank you, Mrs. Humphris.

(Pauline D. Humphris, Juror No. 34, left the Court's Chambers.)

(Lucille B. Downer, Juror No. 22, entered the Court's Chambers.)

The Court: Morning, Mrs. Downer. What we are inquiring about has to do with two items that appeared in [fol. 105] the Denver papers, one in the Post last night and the other in the News this morning about this case. Did you happen to read these items?

Mrs. Downer: I read the one this morning.

The Court: In the News?

Mrs. Downer: Yes.

The Court: Was there anything in that article that would prejudice you against the defendant?

Mrs. Downer: No.

The Court: If we go ahead and try the case and it does reach a point of determination by you, was there anything in the article that would influence you at all in the consideration of the case?

Mrs. Downer: No.

The Court: You feel that you could go ahead at the trial and arrive at your verdict from the evidence you hear in

the courtroom and not give any consideration at all to what you read in these newspapers?

Mrs. Downer: That is right.

The Court: There is nothing you read in the newspaper that would influence you in the consideration of the evidence in the case?

Mrs. Downer: No.

The Court: Do you wish to ask any questions?

Mr. Francis: I know you want to be absolutely fair in this case and it is for that reason that we are inquiring this morning. If your feelings would in any way be in- [fol. 106] fluenced, however slight, by what you read or what you have read and if your feeling would in any way be influenced against the defendant, we would appreciate knowing it.

Mrs. Downer: No, I don't feel that it would make any difference at all, that is what I said.

Mr. Francis: Yes, Ma'am, I know that, but do you feel if you were in Mr. Marshall's chair that the article as read by the jury would still not be unfair to Mr. Marshall?

Mrs. Downer: What do you mean?

Mr. Francis: Well, do you think in your own mind that having read what you did read that you can look at the case fairly?

Mrs. Downer: Well, I feel thatwe (sic) are supposed to just accept what we hear from the witness stand, not anything that is in the paper. There is a lot of things I read in the paper I don't believe.

Mr. Francis: Yes, Ma'am.

The Court: Any further questions?

That is all, thank you, Mrs. Downer.

(Lucille B. Downer, Juror No. 22, left the Court's Chambers.)

[fol. 107]

EXHIBITS MARKED IN CHAMBERS

Newspaper articles filed September 26, 1957.

Rocky Mountain News, September 26, 1957

Jury Selected to Try Man on Drug Charge

A Jury of seven women and five men was selected in U.S. District Court Wednesday to try Howard R. Marshall, 47, former Oklahoma City resident, on charges of dispensing habit-forming drugs without a prescription.

Marshall is on trial before U.S. Dist. Judge Lee Knous on three specific counts of dispensing or selling the drugs to a federal Food and Drug Administration inspector April 23 and May 1, last year.

The inspector, Robert Keating, told the jury of obtaining "some yellow tablets" on April 23. He said he later obtained more tablets and "some capsules" in May. The inspector said he paid $15 on the last purchase.

Don Taylor, FDA chief chemist here, testified that chemical examination showed the "yellow tablets" had as an active ingredient, destro-amphetamine (sic) sulphate, a form of stimulant.

Marshall has a record of two previous felony convictions.

In 1953, while serving a forgery sentence in the State Penitentiary at McAlister, Okla., Marshall testified before a state legislative committee studying new drug laws for Oklahoma.

At that time, he told the committee that although he had only a high school education, he practiced medicine with a $25 diploma he received through the mails. He told in detail of the ease in which he wrote and passed prescriptions for dangerous drugs.

[fol. 108]

Denver Post, September 25, 1957

Trial Opens on Sale of Restricted Drugs

A 47-year-old Tulsa, Okla., man went on trial in Federal District Court here Wednesday on charges of selling re-

stricted drugs on a route between his home town and Denver.

The defendant was Howard R. (Tobey) Marshall, once identified before a committee of the Oklahoma Legislature as a man who acted as a physician and prescribed restricted drugs for Hank Williams before the country singer's death in December, 1953.

A jury was first selected here last Thursday but a mistrial was declared when one of the jurors recalled he had gone to school with a witness in the case.

Marshall was arrested with his wife, Edith Every Marshall, 56, in June, 1956. She was convicted on the drug charges in Federal District Court here in November and was sentenced to 60 days in jail.

Records show that Marshall once served a term in the Oklahoma penitentiary for forgery. There is no evidence he is a doctor, court attaches said.

Filed, United States Court of Appeals, Tenth Circuit, January 21, 1958. Robert B. Cartwright, Clerk.

CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 112] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Tenth Circuit.

Record entry: Cause argued

First Day, May Term, Monday, May 12th, 1958.

Before Honorable Alfred P. Murrah, Honorable John C. Pickett, and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard, George J. Francis, Esquire, appearing for appellant, Arthur A. Dickerman, Esquire, appearing for appellee.

Thereupon argument was commenced by counsel and continued to the hour of adjournment.

[fol. 113]

IN UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

ARGUMENT AND SUBMISSION—May 13, 1958

This cause came on further to be heard, George J. Francis, Esquire, appearing for appellant, Arthur E. Dickerman, Esquire, appearing for appellee.

On motion of appellant, it was ordered that appellant may file a supplemental list of authorities in this cause within five days from this day.

Thereupon argument by counsel was concluded and the cause was submitted to the court.

[fol. 114]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Title omitted]

OPINION—July 22, 1958

George J. Francis for Appellant.

Arthur A. Dickerman (Donald E. Kelley, United States Attorney for the District of Colorado, Robert S. Wham and James C. Perrill, Assistant United States Attorneys for the District of Colorado, and Leonard D. Hardy, Attorney U. S. Department of Health, Education and Welfare, were with him on the brief) for Appellee.

Before Murrah, Pickett and Lewis, Circuit Judges.

Lewis, Circuit Judge.

[fol. 114a] Appellant was convicted on two counts of an information charging violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. 301 et seq. The principal issues before us spring from appellant's contentions that

as a matter of law the defense of entrapment was established and that he was prejudiced beyond recall by newspaper accounts published during the course of his trial. Other errors assigned question the jurisdiction of the court and the sufficiency of the evidence to support the verdicts.

The alleged entrapment centers around the activities of Robert E. Keating, an inspector for the United States Food and Drug Administration and an uncontroverted witness for the prosecution. Keating first met appellant in Denver, Colorado on April 18, 1956. The introduction of the two men was made at appellant's apartment by mutual friends, was purely social in form and did not disclose Keating's official employment. The conversation at this initial meeting was casual and general. On April 23 Keating returned to appellant's apartment and again visited with appellant and his wife. After some further social talk, Keating stated that he was driving to Dallas, Texas, that evening and requested from appellant some stay-awake pills to help him in the traveling. Appellant replied that Keating should obtain and take some No-Doz[1] tablets and drink coffee. [fol. 115] Keating replied that he had tried No-Doz and coffee without obtaining the desired effect and wanted something different. Appellant repeated his recommendation and the conversation was then diverted into other subjects. After Keating left the apartment he was hailed by appellant and handed a package containing five tablets and two capsules. Appellant stated that the tablets were to be used if Keating became sleepy while driving and that the capsules should be taken if he was nervous after arriving in Dallas. Chemical analysis of the tablets established them to be dextro-amphetamine sulfate, a drug within the meaning of 21 U.S.C.A. 353 (b) (1)B[2] and with-

[1] No-Doz is a patented product sold freely over-the-counter.

[2] 21 U.S.C.A. 353 (b) (1). "A drug intended for use by man which—

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(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . .

(C) . . . shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug. . . . The

in the prohibition of unlicensed dispensing under 21 U.S. C.A. 331 (k).[3]

[fol. 116] On May 1, Keating again called on appellant, stating that he had "gotten along very well" on the Dallas trip and would like a hundred or so of each of the drugs for a trip to be made to Los Angeles upon the following day. Appellant replied that he would have to go to the drugstore, refused Keating's suggestion that they go together, and told Keating to return later. This he did and was handed two vials containing 50 tablets and 24 capsules later analyzed as the prohibited drug. Keating paid appellant $15 upon this occasion.

It is undisputed that all of Keating's representations relative to his identity, occupation, trips and use of drugs were entirely false and that upon each occasion the atmosphere of social friendship was created by conversation unrelated to the subject of stay-awake tablets.

The defendant offered no evidence. The issue of entrapment was submitted to the jury upon instructions not here questioned and the defense was rejected by conviction. Appellant urges that the court should have ruled as a matter of law that entrapment was established.

The fountainhead rule and philosophy of entrapment was set out in Sorrells v. United States, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413, and very recently debated in Sherman v. United States, 356 U.S. 369, and Masciale v. United States, 356 U.S. 386, both decided May 19, 1958. In *Sherman,* the court in reviewing the undisputed testimony of a government witness unanimously concluded that the trial court was required under the circumstances there-

---

act of dispensing a drug contrary to the provisions of this paragraph shall be deemed an act which results in the drug being misbranded while held for sale."

[3] 21 U.S.C.A. 331. "The following acts and the causing thereof are hereby prohibited:

* * * * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[fol. 117] in to direct a verdict effectuating the defense of entrapment as a matter of law. The order of reversal set aside a verdict of a jury which had considered and rejected entrapment as a defense submitted to its consideration under instruction of the court. Since the instant case, as *Sherman,* involves only consideration of the undisputed testimony of a government witness with no issue of credibility involved we conclude that submission of the issue of entrapment to the jury was improper. However, such submission could not prejudice appellant, in fact could but give him an unwarranted advantage, unless a directed verdict was required as a matter of law. A comparison of the activities of Keating with those of the informer in *Sherman,* where entrapment was established as a matter of law, and with those of the government agent in *Masciale,* where the court held entrapment not so established, shows the latter case to be persuasive.

In *Sherman,* the government informer met the defendand (sic) at a doctor's office where both were apparently being treated for narcotics addition. They discussed over a period of time their difficulties in overcoming their habits and finally the informer confessed that he was unable to do so, begging the defendant to help him find a source of supply. Only after a number of repetitions of the request did the defendant finally procure the drug for his acquaintance. The result of this conduct was that the defendant himself [fol. 118] returned to the use of narcotics. Emphasis is placed upon the fact that the government played upon the known weaknesses of the defendant and that the crime resulted from the "creative activity" of the law enforcement officials. See 287 U.S. at 441, 451.

In *Masciale,* the defendant was introduced to a government agent by an informer who did not reveal the agent's capacity with the government. The agent solicited the defendant for an introduction to a supplier of heroin. The court noted that the factual situation was such as to allow an inference that the defendant needed no persuasion to commit the crime.

Although in our case the activities of Keating consisted of artifice and deceit to lay a trap for defendant we believe the activities of the government to be well within allowable limits. The law will protect the innocent from being led

to crime through the activities of law enforcement officers, Sherman v. United States, supra, but it will not protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to safely commit crime. Sorrells v. United States, supra; Archambault v. United States (10 Cir.) 224 F. 2d 925.

During the course of the trial two articles of a reckless nature were published in local newspapers covering matters far removed in time and place from a factual report [fol. 119] of the trial occurrences. Six of the jurors read one of the articles and two of the six had read both. The trial court separately interviewed, in the presence and with the assistance of counsel, each of the jurors and thereafter denied a motion for mistrial. Each of the jurors indicated the articles would in no way influence his verdict.[1]

[1] Typical of the responses received by the court is that of the juror Bottinelli:

"The Court: Morning, Mrs. Bottinelli, sit down right there. What I am inquiring about, Mrs. Bottinelli, are a couple of newspaper articles about this case, one of them appeared in the Post last night and one of them in the News this morning. Did you read either one of these pieces?

Mrs. Bottinelli: Yes, I did. I read the one in the News.

The Court: The one in the News this morning?

Mrs. Bottinelli: Yes.

The Court: Did anything you read in that item prejudice you in any way against the defendant?

Mrs. Bottinelli: No, I would try to be as fair as I could.

The Court: Would what you read influence you in any way in reaching a verdict on the case?

Mrs. Bottinelli: No.

The Court: You could lay that out of your mind entirely and decide the case on the evidence you hear from the witness stand?

Mrs. Bottinelli: The evidence I've got to understand is whether he sold the needles, so that would have nothing to do from this.

The Court: You would decide that from the evidence in the courtroom?

Mrs. Bottinelli: Yes, and not the rest.

The Court: You wouldn't have in mind this article you read in the newspaper whether he is guilty or innocent, is that right?

Mrs. Bottinelli: That's right.

The Court: Do any of you want to ask any further questions? All right, Mr. Evans.

Mr. Evans: I'm sure you want to be as fair as possible and certainly we would not have this jury if we didn't think every

fol. 120] It is conceded that a motion for a mistrial is addressed to the sound discretion of the trial judge, and whether it should be granted depends upon all of the circumstances in the case, United States v. Carruthers (7 Cir.) 152 F. 2d 512; Marson v. United States (6 Cir.) 203 F. 2d 904; Webb v. United States (10 Cir.) 191 F. 2d 512. The mere appearance of articles concerning the trial cannot compel a new trial, for the defense may at times be aided rather than hindered or the report may only convey to jurors that which they had heard the previous day in court or amount to fair comment thereon. Miller v. Commonwealth of Kentucky (6 Cir.) 40 F. 2d 820; Klose v. United States (8 Cir.) 49 F. 2d 177; United States v. Pisano (7 Cir.) 193 F. 2d 355. A cautionary instruction against prejudice or consideration of evidence beyond that presented in the courtroom has been held in such instances to be sufficient safeguard for defendant's rights.

It is true that in certain instances the probable influence of newspaper publicity is so obvious that instructions by the court cannot be held to have preserved inviolate defendant's rights to a fair trial before an unbiased jury. See concurring opinion of Justices Jackson and Frankfurter, Shepherd v. Florida, 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740; Griffin v. United States (3 Cir.) 295 F. 437. But the difficulties of ever obtaining a jury completely un-
fol. 121] knowing and hence presumably unprejudiced in this day of wide coverage and circulation of newspapers presents a very real problem in the administration of justice. For this reason, some courts have been lead (sic) to holding that to secure a reversal on this ground the defendant must demonstrate that the failure to declare a mistrial under such circumstances was prejudicial to him.

[illegible] was fair. Do you feel in your heart and without restraint that if you were in the defendant's position, that is to say, sitting at the table with Mr. Marshall as your own mind as it is now as a result of having read the paper, that you could still feel that you could absolutely impartially listen to the case and bring in a [illegible]

Mrs. Bottorff: Yes, I think I could.

Mr. Fortenberry: Fine, thank you very much.

The Court: Thank you very much.

Gicinto v. United States (8 Cir.) 212 F. 2d 8, cert. den. 348 U.S. 884; United States v. Carruthers, supra.

Had the instant trial been to the court alone it would be unquestioned that the court would be capable of and would divorce the extraneous matters from his mind and be perfectly free to continue with the trial. The care with which the trial court explored the knowledge and feeling of the individual jurors indicated to him that each juror was similarly qualified to proceed without prejudice. We cannot say the trial court abused its discretion in accepting as true the solemn statements of the individual jurors that no improper influence would carry over into their deliberations. See United States v. Postma (2 Cir.) 242 F. 2d 488. Strengthening our view that the trial court did not err in denying a mistrial is the completed record of the trial for, as stated in Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination [fol. 122] of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. . . . Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment." 328 U.S. at 762.

Here no affirmative defense was offered, neither the appellant nor a witness for him testified in his behalf; he was content to rely upon the hope of a failure of proof by the prosecution. The evidence was uncontroverted that he committed the crime and his contention that he was entitled to go to the jury on evidence of entrapment appearing in government testimony was, as we have held, without merit. Under all of the circumstances of the case, therefore, a jury properly instructed and acting in accordance with its duty could but return a verdict of guilty. We find no area for prejudice to occupy, even if it existed.

Appellant's other contentions require little discussion.

Asserting in the alternative that the federal court had no jurisdiction to try this offense because the drug, although shown to have traveled in interstate commerce, was no longer within federally protected traffic or that Congress constitutionally lacked the power to grant such jurisdiction, appellant cites the controlling case of United States v. Sullivan, 332 U.S. 689, 68 S. Ct. 331, 92 L. Ed. 297. Both propositions were settled in that case contrary to appellant's position on facts sufficiently similar to preclude argument.

[fol. 123] 21 U.S.C. 331(k) makes it an offense to do any act with respect to a drug which results in its being misbranded while the article is held for sale *after shipment in interstate commerce*. The Supreme Court in the *Sullivan* case refused to give a restrictive interpretation to the statute because Congress intended to give protection to the ultimate consumer from the moment of the introduction of a drug into interstate commerce to the time of final delivery, regardless of intermediate intrastate transactions. It was there held that the Act as thus construed does not exceed the constitutional power of Congress under the Commerce Clause or invade the powers reserved to the states.

The prosecution's case showed that the dextro-amphetamine sulfate tablets were manufactured in New York and that they were ultimately dispensed by appellant in Colorado. Apparently in this, as in most cases, it was impossible to trace the route taken in interstate commerce or to show that appellant received them from an interstate sale, but under the language of the statute and the interpretation of the Supreme Court, intervening sales are immaterial. Archambault v. United States, supra.

Appellant finally argues that the proof that the drugs were manufactured in New York was incomplete, basing his argument on the fact that the tablets were compared for identification purposes with similar tablets previously [fol. 124] collected from various manufacturers by the laboratory of the Food and Drug Administration. However, this comparison with the "reference collection" was only preliminary and the investigation was concluded at the plant of the New York pharmacal company where

identification both chemical and physical was made by the testifying witness. There is no merit in appellant's contention that the fact of interstate shipment was not adequately proved.

Affirmed.

Murrah, dissenting.

We all appreciate the necessity for maintaining the inviolability of jury trials and our inescapable duty to vouchsafe them in the administration of justice. And, we know that we can do so only by wholly disinterested jurors whose judgments are based only upon a consideration of competent proof produced in open court. See Southern Pacific Co. v. Klinge, 65 F.2d 85; Little v. United States, 73 F.2d 861; Stone v. United States, 113 F.2d 70; Briggs v. United States, 221 F.2d 636. We recently had occasion to reemphasize our solicitude in this regard. Consolidated Gas & Equipment Co. v. Clarence E. Carver et al (10 CA) — F.2d —. And see also Rubenstein v. United States, 227 F.2d 638, cert. den. 350 U.S. 926. Our problem is to achieve this ideal in an environment where crime and violence are [fol. 125] exploited by news media and jurors are likely to be exposed, and consciously or unconsciously influenced by the emotional impact of the exploitation. In earlier times juries were completely insulated from all outside contacts. In modern times, the rules have been relaxed to allow jurors to separate under appropriate admonition not to read news accounts of the case on trial or to discuss the case with anyone, or to allow anyone to discuss it with them. Jurors have been trusted to observe these admonitions, and our faith has, in the main, been vindicated. We have indulged in the assumption that mere opportunity for prejudice or even corruption is no proof of it. See Holt v. United States, 218 U.S. 245.

The necessity for conducting trials in an environment where separated jurors are almost unavoidably exposed to news comment, has led some courts to accept the "standard judicial hypothesis that cautioning instructions are effective" to eradicate the contaminating effect of inflammatory exposures, unless there is a "clear and present danger" of the deprivation of a constitutionally protected fair trial

See Chief Judge Clark in United States v. Leviton, 193 F.2d 848. See also Reining v. United States, 167 F.2d 362; United States v. Allied Stevedoring Corp., 241 F.2d 925; United States v. Postma, 242 F.2d 488; Hensloe v. United States, 246 F.2d 190. Many cases on the subject are collected in an Annot. 31 A.L.R. 2d 417.

[fol. 126] I agree with Judge Frank (dissenting in the Leviton case, p. 865) that "trial by newspaper," even in the very midst of irresponsible news comment, is neither inevitable nor tolerable. Without assaying to curb extraneous comment on trials, it is my belief that jurors, while engaged in the trial of a case, can be appropriately and conveniently insulated from exposure to public emotionalism, which often attends criminal cases. Emphatic admonitions by the trial court at the very outset of the trial against the reading of newspapers or listening to news media, would go a long way toward safeguarding the trial against insiduous (sic) and inflammatory matters. The trial court is, to be sure, the first and best judge of what is calculated to contaminate the jury or may have the ineradicable effect of doing so. Appellate courts should interfere only when matters of judicial policy are involved. In my opinion, matters of policy affecting the administration of criminal justice is involved here and it is my duty to speak.

Of course intrusions may be only trivial or innocuous and certainly curable by appropriate admonitions. It is important that mistrials or new trials not be granted for "trifling reasons." See Southern Pacific Co. v. Klinge, supra. They may not be calculated to or have the effect of unduly influencing a juror, either consciously or unconsciously. But the newspaper article to which some of [fol. 127] the jurors in this case were exposed stated not only the developments in the courtroom, it went on to state categorically that the accused had a "record of two previous felony convictions"; that while serving a forgery sentence in a state penitentiary he had testified before a state legislative committee then studying new state drug laws; that he had told the committee of having practiced medicine with a twenty five-dollar diploma received through the mails; and had written and passed prescriptions for

dangerous drugs. The other newspaper article to which some of the jurors were exposed related that the accused had been arrested with his wife; that she had been convicted on drug charges in the same court and sentenced to jail.

Since the accused elected to stand mute and did not offer his character as a defense, these statements were inadmissible and manifestly prejudicial. See Michelson v. United States, 335 U.S. 469. Indeed, no attempt was made to inject these matters in the trial of the case, and the court would have doubtless dealt firmly with any attempt to do so. Recognizing the gravity of the matter, the court conducted a searching inquiry concerning the jurors' exposure to the newspaper articles and illicited (sic) from each of the jurors who had read them a vow that he or she was uninfluenced thereby, and would try the case as if they had not read them. The inquiry was as careful and the responses as positive as one could expect, and if we are to [fol. 128] take the jurors' conscientious word for their state of mind, we must assume that all extraneous knowledge of the accused's prior and damaging record was completely banished from the jurors' minds and did not influence their consideration of his only defense of entrapment. But, the "naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." See Jackson concurring in Krulewitch v. United States, 336 U.S. 440, 453.

Without questioning the thoroughness of the judicial inquiry, or impuning (sic) the conscientiousness of the jurors' avowals, it is my firm conviction that no juror could try this accused on the issue of whether he was in fact induced by the government to commit the act for which he was on trial as if they did not know that his past record and moral traits inclined him toward it. I cannot believe that the untrained human mind is capable of any such nice discriminations. It is too much to expect a juror, sensing the impropriety of having read an extraneous and prejudicial account of a case he is then trying, to admit any prejudicial effect.

If the jury is yet to be the factual judge of the defense of entrapment and the predisposition of the accused rather

than the conduct of the government is to be the legal test, i.e. see Sherman v. United States, 356 U.S. 369; and Masciale v. United States, 356 U.S. 386, prior record and [fol. 129] moral traits become of primary importance in the determination of that vital issue. For in cases like this where entrapment is the only defense, prior convictions of the same offense are to be sure the best evidence to show essential predisposition. This brings us face to face with Mr. Justice Frankfurter's warning of the "Danger of prejudice in such a situation." For, said he, "The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged." Concurring, Sherman v. United States, supra, p. 382. The only escape from the dilemma is to commit the issue of entrapment to the court. But, so long as it remains a jury question, record and reputation to prove predisposition or lack of it must be relevant, competent and admissible. Harbold v. United States (10 CA) decided April 24, 1958, —— F.2d ——. If so, such evidence ought certainly to be produced in open court with the traditional right of confrontation and cross examination. If they are to be excluded, as in this case, they ought not be permitted to seep into the jury room to poison the minds of the jurors on the vital issue which divides guilt and innocence. In sum, it is my view that if the extraneous matter disclosed in the newspaper articles is forbidden, it is ineradicably prejudicial. It it is competent and ad- [fol. 130] missible, it ought to be imparted to the jury in open court. In any event, I would reverse for a new trial.

[fol. 131]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUDGMENT—July 22, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Howard R. Marshall, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

[fol. 132]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed August 1, 1958

To the United States Court of Appeals, Tenth Circuit, and the Judges Thereof:

Comes now the appellant and respectfully presents his petition for rehearing of the above-entitled appeal, and in support thereof respectfully shows:

1. The Court in holding that a defendant in cases involving publications of the type involved in the instant case must show prejudice to himself has misconstrued the law and overlooks the fact that the *Gicinto* and *Carruthers* cases are distinguishable and are not authority to support the holding in the instant case.

2. The Court in holding that the jury herein "could but return a verdict of guilty" disregards the rule that the role of the Appellate Court in cases of this sort is not to determine guilt or innocence of the appellant.

3. The Court disregards the fundamental rule of law that prior convictions when excludable are excluded from evidence by reason of fixed policy without inquiry into the probable effect such convictions might have on the minds of the jurors.

4. The Court's decision that the appellant was not entrapped as a matter of law is in conflict with the *Sherman* case.

[fol. 133] Wherefore, upon the grounds above set forth, it is respectfully prayed that the petition for rehearing be granted, that the opinion of this Court on appeal be withdrawn, and that an opinion be entered remanding the case for new trial or dismissing it.

Respectfully submitted,

George J. Francis, 817 Farmers Union Building, Denver, Colorado, AMherst 6-0621, Attorney for Appellant.

Certificate of Counsel

I, George J. Francis, counsel for appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

/s/ George J. Francis

[fol. 134]

Brief in Support of Petition for Rehearing

I. The Court's Ruling That Prejudice Must Be Shown in Cases of This Sort Is Not Supported by Authority.

The Court herein held fundamentally that considering the publication read by the jurors in the jury room during the course of trial to the effect that appellant had a "record of two previous felony convictions," and that appellant's wife had been convicted and sentenced to jail as a result of the same matters involved herein, the appellant's burden was to show prejudice. This fundamental rule of law enunciated by this Court is based upon two cases, *Gicinto* vs. *United States*, 212 F.2d 8 (8 Cir.), and *United States* vs. *Carruthers*, 152 F.2d 512 (7 Cir.).

Considering that this Circuit is now taking a position for the first time on the point involved, i.e., the jurors' reading of newspapers regarding a defendant's past convictions, it should keep in mind that neither of the above cases support the position now taken in the instant opinion.

In the *Cicinto* case the newspaper article in question stated that the defendant therein had been found not guilty of another crime. And it was further determined in that case that there was no evidence that the article had been read. Similarly, in the *Carruthers* case, the article in question, one far less inflammatory than the article involved herein, was read by only one of the jurors. The evidence in the *Carruthers* case was that one juror could not remember the contents of the article.

Therefore, neither case relied upon by this Honorable Court supports the fundamental proposition it now sets forth for the first time in this circuit or as far as appellant can determine, in any federal circuit.

[fol. 135] II. The Question Involved Is One of Fundamental Policy in Criminal Law and Not a Question of Showing Prejudice.

The Court in its majority opinion sets forth that the appellant must show prejudice. This position overlooks the long-established rule of law that prior convictions when excludable, as herein, cannot be brought to the jury's attention. The Honorable Judge Murrah in his dissenting opinion cites *Michelson* vs. *United States* to the effect that such matters are inadmissible and manifestly prejudicial. This position is in accord with prevailing authority. In the early case of *Greer* vs. *United States*, 245 U.S. 559, Justice Holmes indicated that character evidence relating to a party was inadmissible unless a party first put such matter in issue. Justice Holmes went on to state that the choice of raising such issue rested with the defendant alone:

> "As the Government cannot put in evidence except to answer evidence introduced by the defense the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him" (p. 560).

That it is a matter of longstanding policy to exclude evidence of the type involved is something all courts

accept. The Second Circuit sets forth that doctrine in *United States* vs. *Rattan Co.*, 159 F.2d 656 at page 658:

> "The general rule applicable . . . is that evidence of the commission of a wholly separate and independent crime even of the same nature is not admissible.
>
> "Sound policy in the administration of the criminal law underlies this well established principle . . ."

The Fifth Circuit in *Mackreth* vs. *United States*, 103 F.2d 495, clearly states that the admission of evidence of prior conviction will result in granting of a new trial:

> "Its admission was highly prejudicial and seriously affected the substantial rights of the defendants. The errors committed in admitting it can not be considered harmless under the provisions of Section 269 . . . 28 U.S.C.A. §391."

[fol. 136] Admittedly the problem involved is a difficult one and many matters come to a jury's attention which are improper in varying degrees but not so prejudicial as to result in new trial. Some leeway must be left to newspapers. Similarly, the trial court should have broad discretion in passing upon matters brought before juries by newspapers and other media of communication.

But the line must be drawn beyond which it is not a question of prejudice being shown. When newspapers print matters which result in defendants being deprived of certain well-recognized and well-established rights, then as a matter of sound judicial policy a new trial must be granted.

It is for that reason that appellant respectfully questions the majority opinion of the Court saying that the jury "could but return a verdict of guilty" from the evidence before it. In *Kotteakos* vs. *United States*, 328 U.S. 750, at page 763, the Supreme Court sets forth:

> "Thus, it is not the appellate Court's function to determine guilt or innocence."

The question in the instant case is one of fundamental rights and fair trial.

III. The Ruling in the *Sherman* Case Is in Favor of Appellant.

In the recent case of *Sherman* vs. *United States*, 356 U.S. 369, there were facts quite on a parallel with the instant case. There as here the defendant did not take the stand. Entrapment, therefore, may become an issue without defendant taking the stand. In the *Sherman* case the Court noted the fact that the defendant was not engaged in the narcotic trade and here the trial court ruled out rebuttal on the grounds no similar activity was being offered as rebuttal evidence. In the *Sherman* case the Supreme Court noted the fact, as here, that there was no significant evidence of a profit being made. Also, in both cases matters arose as to past convictions. These comparable matters are commented on by the Supreme Court at page 375. Here, as in the *Sherman* case, we have the "creative activity" of the Government.

A final comparison is the fact that Keating asked for the "stay awake pills" to enable him to make a long drive the [fol. 137] evenings in question and certainly such a request would in many cases be met sympathetically. All in all, a defense of entrapment was well-established and as a matter of law appellant was entitled to a directed verdict.

Respectfully submitted,

George J. Francis, 817 Farmers Union Building, Denver, Colorado, AMherst 6-0621, Attorney for Appellant.

Filed August 1, 1958.

[fol. 138]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—August 21, 1958

Before Honorable Alfred P. Murrah, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[fol. 139] CLERK'S CERTIFICATE (omitted in printing).

[fol. 141]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted limited to the first question presented by the petition for the writ which reads as follows:

"Whether a defendant in a criminal trial to a jury is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 383

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GEORGE J. FRANCIS,
OMER GRIFFIN,
Farmers Union Bldg.,
Denver, Colorado,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No.

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on July 22, 1958.

CITATIONS TO OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals, as well as the dissenting opinion therein, is printed and appended herein as Appendix A, *infra*, p. 6, but has not as yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1958. Rehearing was denied August 21, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Whether a defendant in a criminal trial to a jury is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter.

Whether such a defendant is entitled to a directed verdict of acquittal when entrapment is established without defendant taking the stand and the government has no rebuttal evidence to justify the entrapment.

STATEMENT

The Petitioner was charged by Criminal Information of misbranding of drugs through indiscriminate dispensing without prescription in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. 301 *et seq.* (R. 2-3.) The jurisdiction of the District Court was invoked because the case arose under said Federal Statute. The principal relevant testimony was that of a government agent who concealed his capacity to prevail upon the Petitioner to furnish him with drugs within the scope of the above act without prescription. (R. 9-12, 15-16, 24.) The Petitioner did not take the stand nor present a case. An instruction on entrapment was requested by Petitioner and the same was given. (R. 88-89.) Respondent requested permission to offer rebuttal testimony on entrapment but the request was denied, no relevant testimony on entrapment being submitted by Respondent. (R. 85-87.) A request for a di-

rected verdict of acquittal on grounds of entrapment was denied. (R. 85.)

During the course of trial, six members of the jury obtained two local newspapers which described the progress of Petitioner's trial and contained defamatory matter regarding Petitioner's alleged background. The six jurors who read one or the other of said papers declared they would not be prejudiced against the Petitioner by reason of their reading said articles. (R. 89-106.) Petitioner's motion for mistrial was denied. (R. 59.)

These articles alleged among other things: that Petitioner had "a record of two previous felony convictions"; that Petitioner while serving a forgery sentence testified before a state legislative committee as to his practicing medicine with a $25.00 diploma received through the mails and the ease with which Petitioner wrote and passed prescriptions for dangerous drugs; and that Petitioner had been arrested with his wife, that she had been convicted on drug charges in the same court and sentenced to jail. (R. 107-108.)

The majority of the circuit court ruled in their opinion that the trial court did not abuse its discretion in denying Respondent's motion for mistrial after the jurors had indicated they would not be prejudiced. The dissenting opinion (Judge Murrah) stated matters affecting administration of criminal justice were involved; that the newspapers contained inadmissible and manifestly prejudicial statements and being forbidden they were "ineradicably prejudicial."

REASONS FOR GRANTING THE WRIT

1. The holding of the court below in the instant case is in conflict with the policy that prior convictions of a

defendant in a criminal case, when excludable, cannot be brought to the jury's attention: *Michelson v. United States*, 335 U.S. 469; *Greer v. United States*, 245 U.S. 559; *United States v. Rattan Co.*, 159 F. 2d 656; and *Mackreth v. United States*, 103 F. 2d 495. If then, such matters are inadmissible if presented in open court, the policy forbidding the introduction of such matters should also extend to the reading of such matters by the jury in or out of the jury room. The Petitioner herein did not take the stand and yet an alleged past criminal record was brought to the attention of the jury, something that could not have been done in open Court by the Respondent.

2. The question involved in the instant case is one of major importance in the administration of criminal justice and is as yet unsettled. The precise issue herein has not been determined by this Court to the best of Petitioner's knowledge. The growing impact of newspapers on jurors during trials requires that this Court set forth a clear rule to guide courts in the future.

The instant case falls within the sphere of policy set forth in the concurring opinion of Justices Jackson and Frankfurter. *Shepherd v. Florida*, 341 U.S. 50, and to that extent, the instant case is in conflict. There, the newspaper articles involved recited that the defendant had confessed the crime at issue though no such confession was offered in open court. Here, the Petitioner's wife is said to have been convicted after being arrested at the same time as Petitioner. That statement combined with the other matters set forth in the articles brings the instant case within the thrust of the concurring opinion in the *Shepherd* case. The decision in the instant case for the first time sets forth clearly a new rule of law important to the administration of criminal justice that should be passed upon and settled by this Court.

3. The decision of the lower court is in conflict with *Sherman v. United States*, 356 U.S. 369. In the *Sherman* case the defendant did not take the stand. The "creative activity" of the government in the *Sherman* case is also present here. The failure of the Respondent in the instant case to have to present rebuttal testimony on entrapment to justify the same is comparable to the fact that the defendant in the *Sherman* case was not engaged in the narcotics trade at the time of entrapment. Entrapment in the instant case was established as a matter of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE J. FRANCIS,
OMER GRIFFIN,

Farmers Union Bldg.,
Denver, Colorado,

Attorneys for Petitioner.

Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Number 5796 — May Term, 1958

Howard R. Marshall,
Appellant,
vs.
United States of America,
Appellee.

Appeal from the United States District Court for the District of Colorado

[Filed July 22, 1958]

George J. Francis for Appellant.

Arthur A. Dickerman (Donald E. Kelley, United States Attorney for the District of Colorado, Robert S. Wham and James C. Perrill, Assistant United States Attorneys for the District of Colorado, and Leonard D. Hardy, Attorney U. S. Department of Health, Education and Welfare, were with him on the brief) for Appellee.

Before **Murrah, Pickett** and **Lewis,** Circuit Judges.

Lewis, Circuit Judge.

Appellant was convicted on two counts of an information charging violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. 301 et seq. The principal issues before us spring from appellant's contentions that as a matter of law the defense of entrapment was established and that he was prejudiced beyond recall by newspaper accounts published during the course of his trial.

Other errors assigned question the jurisdiction of the court and the sufficiency of the evidence to support the verdicts.

The alleged entrapment centers around the activities of Robert E. Keating, an inspector for the United States Food and Drug Administration and an uncontroverted witness for the prosecution. Keating first met appellant in Denver, Colorado, on April 18, 1956. The introduction of the two men was made at appellant's apartment by mutual friends, was purely social in form and did not disclose Keating's official employment. The conversation at this initial meeting was casual and general. On April 23 Keating returned to appellant's apartment and again visited with appellant and his wife. After some further social talk, Keating stated that he was driving to Dallas, Texas, that evening and requested from appellant some stay-awake pills to help him in the traveling. Appellant replied that Keating should obtain and take some No-Doz[1] tablets and drink coffee. Keating replied that he had tried No-Doz and coffee without obtaining the desired effect and wanted something different. Appellant repeated his recommendation and the conversation was then diverted into other subjects. After Keating left the apartment he was hailed by appellant and handed a package containing five tablets and two capsules. Appellant stated that the tablets were to be used if Keating became sleepy while driving and that the capsules should be taken if he was nervous after arriving in Dallas. Chemical analysis of the tablets established them to be dextro-amphetamine sulfate, a drug within the meaning of 21 U.S.C.A. 353(b)(1)B[2] and within the pro-

[1]No-Doz is a patented product sold freely over-the-counter.

[2]21 U.S.C.A. 353(b)(1). "A drug intended for use by man which—

* * *

(B) because of its toxicity or other potentiality for harmful

hibition of unlicensed dispensing under 21 U.S.C.A. 331(k).[3]

On May 1, Keating again called on appellant, stating that he had "gotten along very well" on the Dallas trip and would take a hundred or so of each of the drugs for a trip to be made to Los Angeles upon the following day. Appellant replied that he would have to go to the drugstore, refused Keating's suggestion that they go together, and told Keating to return later. This he did and was handed two vials containing 50 tablets and 24 capsules later analyzed as the prohibited drug. Keating paid appellant $15 upon this occasion.

It is undisputed that all of Keating's representations relative to his identity, occupation, trips and use of drugs were entirely false and that upon each occasion the atmosphere of social friendship was created by conversation unrelated to the subject of stay-awake tablets.

The defendant offered no evidence. The issue of entrapment was submitted to the jury upon instructions not here questioned and the defense was rejected by conviction. Appellant urges that the court should have ruled as a matter of law that entrapment was established.

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[2] (Continued)
effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . . .

(C) . . . shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug . . . The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed an act which results in the drug being misbranded while held for sale."

[3] 21 U.S.C.A. 331. "The following acts and the causing thereof are hereby prohibited:

* * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

The fountainhead rule and philosophy of entrapment was set out in Sorrells v. United States, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413, and very recently debated in Sherman v. United States, ... U. S. ....., and Masciale v. United States, ... U. S. ....., both decided May 19, 1958. In *Sherman*, the court in reviewing the undisputed testimony of a government witness unanimously concluded that the trial court was required under the circumstances therein to direct a verdict effectuating the defense of entrapment as a matter of law. The order of reversal set aside a verdict of a jury which had considered and rejected entrapment as a defense submitted to its consideration under instruction of the court. Since the instant case, as *Sherman* involves only consideration of the undisputed testimony of a government witness with no issue of credibility involved we conclude that submission of the issue of entrapment to the jury was improper. However, such submission could not prejudice appellant, in fact could but give him an unwarranted advantage, unless a directed verdict was required as a matter of law. A comparison of the activities of Keating with those of the informer in *Sherman*, where entrapment was established as a matter of law, and with those of the government agent in *Masciale*, where the court held entrapment not so established, shows the latter case to be persuasive.

In *Sherman*, the government informer met the defendant at a doctor's office where both were apparently being treated for narcotics addiction. They discussed over a period of time their difficulties in overcoming their habits and finally the informer confessed that he was unable to do so, begging the defendant to help him find a source of supply. Only after a number of repeti-

tions of the request did the defendant finally procure the drug for his acquaintance. The result of this conduct was that the defendant himself returned to the use of narcotics. Emphasis is placed upon the fact that the government played upon the known weaknesses of the defendant and that the crime resulted from the "creative activity" of the law enforcement officials. See 287 U.S. at 441, 451.

In *Masciale*, the defendant was introduced to a government agent by an informer who did not reveal the agent's capacity with the government. The agent solicited the defendant for an introduction to a supplier of heroin. The court noted that the factual situation was such as to allow an inference that the defendant needed no persuasion to commit the crime.

Although in our case the activities of Keating consisted of artifice and deceit to lay a trap for defendant we believe the activities of the government to be well within allowable limits. The law will protect the innocent from being led to crime through the activities of law enforcement officers, Sherman v. United States, supra, but it will not protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to safely commit crime. Sorrells v. United States, supra; Archambault v. United States, (10 Cir.) 224 F. 2d 925.

During the course of the trial two articles of a reckless nature were published in local newspapers covering matters far removed in time and place from a factual report of the trial occurrence. Six of the jurors read one of the articles and two of the six had read both. The trial court separately interviewed, in the presence and with the assistance of counsel, each of the jurors and

thereafter denied a motion for mistrial. Each of the jurors indicated the articles would in no way influence his verdict.[4]

It is conceded that a motion for a mistrial is addressed to the sound discretion of the trial judge, and whether it should be granted depends upon all of the circumstances in the case, United States v. Carruthers (7 Cir.) 152 F. 2d 512; Marson v. United States (6 Cir.) 203 F. 2d 904; Webb v. United States (10 Cir.) 191 F. 2d 512. The mere appearance of articles concerning the trial cannot compel a new trial, for the defense may at times be

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[4]Typical of the responses received by the court is that of the juror Bottinelli.

"The Court: Morning, Mrs. Bottinelli, sit down right there. What I am inquiring about, Mrs. Bottinelli, are a couple of newspaper articles about this case, one of them appeared in the Post last night and one of them in the News this morning. Did you read either one of these pieces?

Mrs. Bottinelli: Yes, I did, I read the one in the News.

The Court: The one in the News this morning?

Mrs. Bottinelli: Yes.

The Court: Did anything you read in that item prejudice you in any way against the defendant?

Mrs. Bottinelli: No, I would try to be as fair as I could.

The Court: Would what you read influence you in any way in reaching a verdict on the case?

Mrs. Bottinelli: No.

The Court: You could lay that out of your mind entirely and decide the case on the evidence you hear from the witness stand?

Mrs. Bottinelli: The evidence I've got to understand is whether he sold the medicine, so that would have nothing to do from this.

The Court: You would decide from the evidence in the courtroom?

Mrs. Bottinelli: Yes, and not the rest.

The Court: You wouldn't have in mind this article you read in the newspaper whether he is guilty or innocent, is that right?

Mrs. Bottinelli: That's right.

The Court: Do any of you want to ask any further question? All right, Mr. Francis.

Mr. Francis: I realize you want to be as fair as possible and certainly we would not have this jury if we didn't think every member was fair. Do you feel in your heart and without restraint that if you were in the defendant's position, that is to say, sitting where Mr. Marshall is sitting, and your own mind is as it is now as a result of having read the paper, that you could still feel that you could absolutely, impartially listen to the case and bring in a verdict?

Mrs. Bottinelli: Yes, I think I could.

Mr. Francis: Fine, thank you very much.

The Court: Thank you very much."

aided rather than hindered or the report may only convey to jurors that which they had heard the previous day in court or amount to fair comment thereon. Miller v. Commonwealth of Kentucky (6 Cir.) 40 F. 2d 820; Klose v. United States (8 Cir.) 49 F. 2d 177; United States v. Pisano (7 Cir.) 193 F. 2d 355. A cautionary instruction against prejudice or consideration of evidence beyond that presented in the courtroom has been held in such instances to be sufficient safeguard for defendant's rights.

It is true that in certain instances the probable influence of newspaper publicity is so obvious that instructions by the court cannot be held to have preserved inviolate defendant's rights to a fair trial before an unbiased jury. See concurring opinion of Justices Jackson and Frankfurter, Shepherd v. State of Florida, 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740; Griffin v. United States (3 Cir.) 295 F. 437). But the difficulties of ever obtaining a jury completely unknowing and hence presumably unprejudiced in this day of wide coverage and circulation of newspapers presents a very real problem in the administration of justice. For this reason, some courts have been lead to holding that to secure a reversal on this ground the defendant must demonstrate that the failure to declare a mistrial under such circumstances was prejudicial to him, Gicinto v. United States (8 Cir.) 212 F. 2d 8, cert. den. 348 U.S. 884; United States v. Carruthers, supra.

Had the instant trial been to the court alone it would be unquestioned that the court would be capable of and would divorce the extraneous matters from his mind and be perfectly free to continue with the trial. The care with which the trial court explored the knowledge and feeling of the individual jurors indicated to him that each juror was similarly qualified to proceed without preju-

dice. We cannot say the trial court abused its discretion in accepting as true the solemn statements of the individual jurors that no improper influence would carry over into their deliberations. See United States v. Postma (2 Cir.) 242 F. 2d 488. Strengthening our view that the trial court did not err in denying a mistrial is the completed record of the trial for, as stated in Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment." 328 U.S. at 762.

Here no affirmative defense was offered, neither the appellant nor a witness for him testified in his behalf; he was content to rely upon the hope of a failure of proof by the prosecution. The evidence was uncontroverted that he committed the crime and his contention that he was entitled to go to the jury on evidence of entrapment appearing in government testimony was, as we have held, without merit. Under all of the circumstances of the case, therefore, a jury properly instructed and acting in accordance with its duty could but return a verdict of guilty. We find no area for prejudice to occupy, even if it existed.

Appellant's other contentions require little discussion. Asserting in the alternative that the federal court

had no jurisdiction to try this offense because the drug, although shown to have traveled in interstate commerce, was no longer within federally protected traffic or that Congress constitutionally lacked the power to grant such jurisdiction, appellant cites the controlling case of United States v. Sullivan, 332 U.S. 689, 68 S. Ct. 331, 92 L. Ed. 297. Both propositions were settled in that case contrary to appellant's position on facts sufficiently similar to preclude argument.

21 U.S.C. 331(k) makes it an offense to do any act with respect to a drug which results in its being misbranded while the article is held for sale *after shipment in interstate commerce*. The Supreme Court in the *Sullivan* case refused to give a restrictive interpretation to the statute because Congress intended to give protection to the ultimate consumer from the moment of the introduction of a drug into interstate commerce to the time of final delivery, regardless of intermediate intrastate transactions. It was there held that the Act as thus construed does not exceed the constitutional power of Congress under the Commerce Clause or invade the powers reserved to the states.

The prosecution's case showed that the dextro-amphetamine sulfate tablets were manufactured in New York and that they were ultimately dispensed by appellant in Colorado. Apparently in this, as in most cases, it was impossible to trace the route taken in interstate commerce or to show that appellant received them from an interstate sale, but under the language of the statute and the interpretation of the Supreme Court, intervening sales are immaterial. Archambault v. United States, supra.

Appellant finally argues that the proof that the

drugs were manufactured in New York was incomplete, basing his argument on the fact that the tablets were compared for identification purposes with similar tablets previously collected from various manufacturers by the laboratory of the Food and Drug Administration. However, this comparison with the "reference collection" was only preliminary and the investigation was concluded at the plant of the New York pharmacal company where identification both chemical and physical was made by the testifying witness. There is no merit in appellant's contention that the fact of interstate shipment was not adequately proved.

AFFIRMED.

MURRAH, dissenting.

We all appreciate the necessity for maintaining the inviolability of jury trials and our inescapable duty to vouchsafe them in the administration of justice. And, we know that we can do so only by wholly disinterested jurors whose judgments are based only upon a consideration of competent proof produced in open court. See Southern Pacific Co. v. Klinge, 65 F. 2d 85; Little v. United States, 73 F. 2d 861; Stone v. United States, 113 F. 2d 70; Briggs v. United States, 221 F. 2d 636. We recently had occassion to re-emphasize our solicitude in this regard. Consolidated Gas & Equipment Co. v. Clarence F. Carver et al (10 CA) ..... F. 2d..... And see also Rabenstein v. United States, 227 F. 2d 638, cert. den. 350 U.S. 993. Our problem is to achieve this ideal in an environment where crime and violence are exploited by news media and jurors are likely to be exposed, and consciously or unconsciously influenced by the emotional impact of the exploitation. In earlier times juries were com-

pletely insulated from all outside contacts. In modern times, the rules have been relaxed to allow jurors to separate under appropriate admonition not to read news accounts of the case on trial or to discuss the case with anyone, or to allow anyone to discuss it with them. Jurors have been trusted to observe these admonitions, and our faith has, in the main, been vindicated. We have indulged in the assumption that mere opportunity for prejudice or even corruption is no proof of it. See Holt v. United States, 218 U.S. 245.

The necessity for conducting trials in an environment where separated jurors are almost unavoidably exposed to news comment, has led some courts to accept the "standard judicial hypothesis that cautioning instructions are effective" to eradicate the contaminating effect of inflammatory exposures, unless there is a "clear and present danger" of the deprivation of a constitutionally protected fair trial. See Chief Judge Clark in United States v. Leviton, 193 F. 2d 848. See also Reining v. United States, 167 F. 2d 362; United States v. Allied Stevedoring Corp., 241 F. 2d 925; United States v. Postma, 242 F. 2d 488; Henslee v. United States, 246 F. 2d 190. Many cases on the subject are collected in an Annot. 31 A.L.R. 2d 417.

I agree with Judge Frank (dissenting in the Leviton case, p. 865) that "trial by newspaper," even in the very midst of irresponsible news comment, is neither inevitable nor tolerable. Without assaying to curb extraneous comment on trials, it is my belief that jurors, while engaged in the trial of a case, can be appropriately and conveniently insulated from exposure to public emotionalism, which often attends criminal cases. Emphatic admonitions by the trial court at the very outset of the trial against the reading of newspapers or listening to news

media, would go a long way toward safeguarding the trial against insidious and inflammatory matters. The trial court is, to be sure, the first and best judge of what is calculated to contaminate the jury or may have the ineradicable effect of doing so. Appellate courts should interfere only when matters of judicial policy are involved. In my opinion, matters of policy affecting the administration of criminal justice is involved here and it is my duty to speak.

Of course intrusions may be only trivial or innocuous and certainly curable by appropriate admonitions. It is important that mistrials or new trials not be granted for "trifling reasons." See Southern Pacific Co. v. Klinge, supra. They may not be calculated to or have the effect of unduly influencing a juror, either consciously or unconsciously. But the newspaper article to which some of the jurors in this case were exposed stated not only the developments in the courtroom, it went on to state categorically that the accused had a "record of two previously felony convictions"; that while serving a forgery sentence in a state penitentiary, he had testified before a state legislative committee then studying new state drug laws; that he had told the committee of having practiced medicine with a twenty-five dollar diploma received through the mails; and had written and passed prescriptions for dangerous drugs. The other newspaper article to which some of the jurors were exposed related that the accused had been arrested with his wife; that she had been convicted on drug charges in the same court and sentenced to jail.

Since the accused elected to stand mute and did not offer his character as a defense, these statements were inadmissible and manifestly prejudicial. See Michelson v. United States, 335 U.S. 469. Indeed, no attempt was

made to inject these matters in the trial of the case, and the court would have doubtless dealt firmly with any attempt to do so. Recognizing the gravity of the matter, the court conducted a searching inquiry concerning the jurors' exposure to the newspaper articles and illicited from each of the jurors who had read them a vow that he or she was uninfluenced thereby, and would try the case as if they had not read them. The inquiry was as careful and the responses as positive as one could expect, and if we are to take the jurors' conscientious word for their state of mind, we must assume that all extraneous knowledge of the accussed's prior and damaging record was completely banished from the jurors' minds and did not influence their consideration of his only defense of entrapment. But, the "naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." See Jackson concurring in Krulewitch v. United States, 336 U.S. 440, 453.

Without questioning the thoroughness of the judicial inquiry, or impuning the conscientiousness of the jurors' avowals, it is my firm conviction that no juror could try this accused on the issue of whether he was in fact induced by the government to commit the act for which he was on trial as if they did not know that his past record and moral traits inclined him toward it. I cannot believe that the untrained human mind is capable of any such nice discriminations. It is too much to expect a juror, sensing the impropriety of having read an extraneous and prejudicial account of a case he is then trying, to admit any prejudicial effect.

If the jury is yet to be the factual judge of the defense of entrapment and the predisposition of the accused rather than the conduct of the government is to be the

legal test, i.e. see Sherman v. United States, 356 U.S. 369; and Mascaile v. United States, 356 U.S. 386, prior record and moral traits become of primary importance in the determination of that vital issue. For in cases like this where entrapment is the only defense, prior convictions of the same offense are to be sure the best evidence to show essential predisposition. This brings us face to face with Mr. Justice Frankfurter's warning of the "Danger of prejudice in such a situation." For, said he, "The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged." Concurring, Sherman v. United States, supra, p. 382. The only escape from the dilemma is to commit the issue of entrapment to the court. But, so long as it remains a jury question, record and reputation to prove predisposition or lack of it must be relevant, competent and admissible. Harbolt v. United States (10 CA) decided April 24, 1958, ... F. 2d..... If so, such evidence ought certainly to be produced in open court with the traditional right of confrontation and cross examination. If they are to be excluded, as in this case, they ought not be permitted to seep into the jury room to poison the minds of the jurors on the vital issue which divides guilt and innocence. In sum, it is my view that if the extraneous matter disclosed in the newspaper article is forbidden, it is ineradicably prejudicial. If it is competent and admissible, it ought to be imparted to the jury in open court. In any event, I would reverse for a new trial.

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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1958

HOWARD R. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 6-19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1958. Rehearing was denied on August 21, 1958. The petition for a writ of certiorari was filed September 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge properly refused to hold that there was entrapment as a matter of law.

2. Whether the trial judge properly refused to grant a mistrial on the ground that during the trial some of the jurors had read newspaper stories unfavorable to the petitioner.

STATEMENT

An information filed in the District Court for Colorado alleged that on two occasions the petitioner unlawfully dispensed a number of dextro-amphetamine sulfate tablets, a drug within the scope of 21 U.S.C. 353 (b)(1)(B), without a prescription from a licensed physician, which resulted in misbranding in violation of 21 U.S.C. 331(k) (R. 2-4). At the trial, a government agent, Robert E. Keating, testified that he was introduced to the petitioner in the guise of a salesman (R. 8-10, 26-28). After some casual conversation, Keating told the petitioner that he was about to undertake a lengthy trip by car, and was desirous of obtaining some "stay-awake" pills (R. 10, 26-27). The petitioner suggested using No-Doz and coffee, but Keating replied that he had tried this to no avail (R. 10, 26, 27). Nothing further was said about the matter, but as Keating was leaving the petitioner's apartment he was called back and given a package by the petitioner which contained five tablets and two capsules. The petitioner gave Keating directions to take the tablets during the trip and the capsules later if he felt nervous (R. 10-11, 25). Later analysis showed that the tablets in the package were dextro-amphetamine sulfate tablets (R. 30-31). At a later time, Keating said he would like about a hundred of the drugs to leave in the car since he was going on another trip. Keating obtained 50 tablets of the drug and 24 capsules, this time paying the petitioner $15 (R. 15-16, 31-32, 33-35).

The petitioner asked the trial judge to hold that there was entrapment as a matter of law, but this request was refused (R. 85). The government asked to be allowed to prove that the petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. This too was refused, the trial judge being of the opinion that since it would not be shown that the petitioner dispensed drugs of a type here involved, the evidence would not be relevant for the government's purposes (R. 85-87).

During the trial, news stories were published which contained statements about the petitioner's previous criminal record, the conviction already obtained against the petitioner's wife on charges growing out of the same affair, and testimony given by the petitioner before an Oklahoma legislative committee relating the ease with which the petitioner practiced medicine without a license and identifying the petitioner as the man who had prescribed drugs for Hank Williams, a singer, shortly before the latter's death. (R. 107, 108). At the trial itself, the petitioner did not take the stand. When it was learned that some of the jurors had apparently seen the articles, the judge called each of the jurors into his chambers individually (R. 54-60, 90-106). Counsel for both sides were present during the questioning, and participated in the inquiry. (R. 90-106). Six of the jurors had not read the articles and did not know the contents (R. 90-91, 93, 95-96, 97-98, 101-102, 103-104). Two of the remaining six said they had only scanned the articles and could not recall the contents (R. 93-94, 98-100). The other four had no hesitation in saying that they felt no prejudice against the petitioner, and that they could decide the case solely on the basis of the testi-

mony given in court (R. 91-92, 100-101, 102-103, 104-106). The petitioner's motion for mistrial was thereupon denied (R. 59-60).

The petitioner did not interpose any evidence of his own (R. 85). The judge submitted the case to the jury with an instruction on entrapment (R. 88-89). The petitioner was found guilty on both counts and sentenced to imprisonment for six months (R. 4, 6-7). The Court of Appeals for the Tenth Circuit affirmed, one judge dissenting (Pet. 6-19).

ARGUMENT

1. The Court of Appeals felt that the undisputed evidence so far failed to present any issue of entrapment that, in submitting the issue to the jury at all, the district court was more favorable to the petitioner than was required. Cf. *United States* v. *Pisano*, 193 F. 2d 355 at 361 (C.A. 7). Whether this is correct or not, the testimony was not such as to call for a directed verdict based on entrapment. *Masciale* v. *United States*, 356 U.S. 386. The petitioner was obviously not introduced by Keating to the business of selling pills without prescription. Keating provided the opportunity to make the sale, but, significantly, on the first occasion the petitioner had the drugs and capsules in his possession. He not only delivered them to Keating but he gave Keating directions for use. Later he sold Keating a substantial quantity, 50 tablets for $15.00, after telling him that he did not have enough tablets on hand and to come back later. On this evidence, the jury had the right to conclude that the petitioner was not entrapped.

2. A motion for a mistrial is directed to the discretion of the trial judge. *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), certiorari denied, 335 U.S. 830. The

fact that some of the jury read articles containing information about the petitioner's criminal record does not require a reversal, even though such information was inadmissible at the trial. *Rowley* v. *United States*, 185 F. 2d 523 (C.A. 8). Before allowing the trial to proceed, the trial judge assured himself of the ability of the jury to render an impartial verdict. He took careful precautions in this respect, questioning each juror individually and having counsel join in the proceedings. The case presented a simple factual issue, as one of the jurors indicated (R. 102). And while the information in the articles had a bearing on the issue of entrapment that claim was so unsubstantial that there is no reason to assume prejudice in the face of the contrary finding of the trial judge made after careful inquiry.

CONCLUSION

The case was correctly decided in the lower courts on both the law and the facts. There is no issue calling for review by this Court.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

OCTOBER 1958.

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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1958

HOWARD R. MARSHALL, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
PAUL J. KOMIVES,
Attorneys,
Department of Justice,
Washington 25, D. C.

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---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 54-65) is reported at 258 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals was entered July 22, 1958. The petition for a writ of certiorari was filed on September 19, 1958, and the petition was granted on November 17, 1958 (R. 71). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The first question presented by the petition for a writ of certiorari, to which the grant of certiorari was limited (R. 71), reads as follows:

Whether a defendant in a criminal trial to a jury is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter.

STATEMENT

1. An information filed in the District Court for the District of Colorado alleged that on two occasions the petitioner unlawfully dispensed a number of dextroamphetamine sulfate tablets, a drug within the scope of 21 U.S.C. 353(b)(1)(B) (Pet. Br. 2), without a prescription from a licensed physician, which resulted in misbranding in violation of 21 U.S.C. 331(k) (Pet. Br. 2) (R. 2-3). The petitioner was found guilty on both counts and sentenced to imprisonment for six months (R. 4, 6-7). The Court of Appeals for the Tenth Circuit affirmed, one judge dissenting (R. 54-66).

At the trial, a government agent, Robert E. Keating, testified that he was introduced by a friend to the petitioner in the guise of a salesman (R. 8-9, 25-26). Some five days after the first introduction, Keating met petitioner for the second time (R. 9, 24). After some social conversation, Keating told the petitioner that he was about to undertake a lengthy trip by car, and was desirous of obtaining some "stay-awake" pills (R. 9-10, 24, 25-26). The petitioner suggested using No-Doz and coffee, but Keating replied that he had

tried this to no avail (R. 10, 24-25). Nothing further was said about the matter, but as Keating was leaving the petitioner's apartment he was called back and given a package by the petitioner which contained five tablets and two capsules (R. 10-11). The petitioner gave Keating directions to take the tablets during the trip and the capsules later if he felt nervous (R. 11). Later analysis showed that the tablets in the package were dextro-amphetamine sulfate tablets. At a later time, Keating said he would like about a hundred of the drugs to leave in the car since he was going on another trip (R. 14-16). Keating obtained 50 tablets of the drug and 24 capsules, this time paying the petitioner $15 (R. 15-16).

The petitioner asked the trial judge to hold that there was entrapment as a matter of law, but this request was refused (R. 34-35). The government asked to be allowed to prove that the petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. This too was refused, the trial judge being of the opinion that since it would not be shown that the petitioner had dispensed drugs of the type here involved, the evidence would not be relevant for the government's purposes (R. 35-36).

2. The trial ran for three days. Inspector Keating testified on the first day. At the first recess, the judge cautioned the jury about outside influences (R. 16). The warning was repeated at the noon recess, and again before concluding the day's activities (R. 26, 27). On the morning of the second day, it was brought to the attention of the court that two newspaper articles had been published, since the end of the pre-

vious day's proceedings, which contained statements about petitioner.

The headlines on the articles were merely, in one paper, "Jury Selected to Try Man on Drug Charge"; and, in the other, "Trial Opens on Sale of Restricted Drugs" (R. 52-53). In the first paper, the *Rocky Mountain News*, the article, after four short paragraphs reciting the charges and what had thus far occurred at the trial, also reported that petitioner had two previous convictions for felony; that in 1953 petitioner had told an Oklahoma legislative committee that, although he had only a high school education, he practiced medicine with a diploma received through the mails; that petitioner told in detail of the ease with which he wrote and passed prescriptions for dangerous drugs (R. 52). The other paper, the *Denver Post*, after noting the start of the trial, reported that petitioner had once been identified before an Oklahoma legislature as one who acted as a physician and prescribed restricted drugs for a singer before his death; that petitioner's wife had been convicted on the drug charges; and that petitioner had once served a term for forgery (R. 52-53).

In a discussion between court and counsel as to the procedure to follow in these circumstances (R. 27-31), petitioner's counsel stated that he "would prefer the individual interrogation of the jurors by the Court in chambers" (R. 30). On inquiry, government counsel stated to the court that they had not supplied the adverse information, and so far as they knew no other government agent had done so (R. 27-28). Apparently, the reporters had seen an article in a national magazine mentioning petitioner, and also had some other non-federal source of information (R. 27-29).

Each of the jurors was called into chambers individually, with counsel present and participating in the questioning (R. 39ff.). Six of the jurors had not seen either of the articles and did not know the contents (R. 39-40, 41, 43-44, 44-45, 47-48, 49-50). Two of the remaining six said they had only scanned the articles and could not recall the contents (R. 42-43, 45-46). Three of the others had read the article in the *Rocky Mountain News* (R. 40-41, 48-49, 50-51), and one had read both articles (R. 47). Each juror said that he would not be influenced by the newspaper articles, could decide the case only on the evidence in the courtroom, and felt no prejudice against petitioner as the result of the articles (R. 40-41, 47, 48-49, 50-51). In the interview with one of those who had read the article in the *News*, the following occurred (R. 41):

> Mr. Francis [Petitioner's attorney]: I wonder if I might inquire, were you in anyway affected so far as your feelings toward Mr. Marshall were concerned, by the article?
>
> Mr. Gomer [Juror]: No, sir, hardly.
>
> Mr. Hardey [Government counsel]: You recognize, of course, that newspaper articles are frequently untrue and not verified and do not necessarily reflect true facts?
>
> Mr. Gomer: Yes, sir.
>
> Mr. Hardey: It might well be the situation here, might it?
>
> Mr. Gomer: Yes, sir.

Another juror who had read the *News* article was asked by the court (R. 48-49):

> The Court: You could lay that out of your mind entirely and decide the case on the evidence you hear from the witness stand?

Mrs. Bottinelli [Juror]: The evidence I've got to understand is whether he sold the medicine, so that would have nothing to do from this.

The Court: You would decide that from the evidence in the courtroom?

Mrs. Bottinelli: Yes, and not the rest.

As to another of this group, the following occurred in response to questions by petitioner's counsel (R. 51):

Mr. Francis: I know you want to be absolutely fair in this case and it is for that reason that we are inquiring this morning. If your feelings would in any way be influenced, however slight, by what you read or what you have read and if your feelings would in any way be influenced against the defendant, we would appreciate knowing it.

Mrs. Downer [Juror]: No, I don't feel that it would make any difference at all, that is what I said.

Mr. Francis: Yes, Ma'am, I know that, but do you feel if you were in Mr. Marshall's chair that the article as read by the jury would still not be unfair to Mr. Marshall?

Mrs. Downer: What do you mean?

Mr. Francis: Well, do you think in your own mind that having read what you did read that you can look at the case fairly?

Mrs. Downer: Well, I feel that we are supposed to just accept what we hear from the witness stand, not anything that is in the paper. There is a lot of things I read in the paper that I don't believe.

The petitioner's motion for mistrial was thereupon denied (R. 31). The judge stated, *inter alia* (R. 31):

* * * I am satisfied with the interrogation of the jurors—there were only about four of them had

read the article in the newspaper—all of them satisfied me they would not be influenced in any way about the item, could proceed and render a fair and impartial verdict from the evidence and the law in the case.

I think the signs [*sic*] of the jurors was very apparent from their answers and their demeanor while they were here, and I feel very confident in my own mind that the matter having been called to their attention, that they will lean over backwards, as a matter of fact, in consideration of the case to stay away from any extraneous matter they may have read or heard or anything else.

* * * * * *

I think the jury was not prejudiced in any way or impressed, as a matter of fact, by the article. I feel that there will be no prejudice of the defendant for the proceeding of the trial. * * *

The petitioner did not present any evidence of his own in defense (R. 35). The judge submitted the case to the jury with an instruction on entrapment (R. 38). In his final instructions, the judge cautioned the jury as follows:[1]

Now, the arguments of counsel and the remarks the Court has made during the course of the trial are not evidence and should not be considered by you as evidence. The evidence that you are to consider in this case is the testimony you have heard from the witness stand and the exhibits which have been admitted into evidence by the Court, and your deliberations should consider no other circumstances whatsoever and should not go

[1] This portion of the instructions was not included in the record filed by petitioner before the Court of Appeals and certified to this Court, but was before the Court of Appeals as an appendix to the appellee's (the Government's) brief, p. 19.

beyond a consideration of the evidence you have actually heard and the exhibits that you will have an opportunity to examine.

SUMMARY OF ARGUMENT

I

The question presented by this case first involves the broad issue of whether a trial judge has any discretion to deny a motion for a mistrial when it is brought to light that some of the jurors have read damaging inadmissible material in newspaper accounts of the trial, even though a careful interrogation leads the judge to conclude positively that the jurors are capable of proceeding in a fair and impartial manner, and of reaching a verdict based only on the courtroom evidence. The record here establishes that the prosecution was not responsible for the information reaching the press. It also establishes that the jury were interrogated carefully, with counsel for both sides participating, and that the trial judge gave a cautionary instruction to the jury in this regard. Under these circumstances, the considered judgment of the District Court is entitled to controlling weight.

A. This Court's last full consideration of the problem of newspaper publicity affecting the impartial consideration of a defendant's case (*Holt* v. *United States*, 218 U.S. 245) affirmed the general principle that the trial judge has discretion in this type of matter. The Court ruled that, even on the assumption that the jurors had actually read misleading newspaper stories, the automatic granting of a motion for a mistrial was not required. No case in the federal Courts of Appeals establishes the proposition for which petitioner argues, *i.e.*, that the mere showing that some jurors have read

damaging inadmissible evidence requires the granting of a motion for a mistrial and precludes an examination of the jurors to aid in ascertaining whether they can remain impartial. On the contrary, the cases are in accord with the majority opinion below.

B. The rulings on prejudice to a defendant, as a result of jurors reading newspaper articles about the trial, separate into two categories—those involving a motion for a new trial made after the jury has returned a verdict, and those involving a motion for a mistrial (such as in the instant case) made before the jury has retired for its deliberations. In the former situation, the rule is often followed that jurors will not be allowed to impeach their own verdict. Because of this rule, and because the courts do not wish to preclude a showing by a losing defendant that his trial was fatally infected, the courts may, on a proper showing of the overt acts from which prejudice may be deduced, assume that prejudice resulted—while excluding testimony of the jurors either for or against that conclusion. In the latter situation, on the other hand, there can be no question of the jurors impeaching their own verdict, and the issue becomes a factual one of how best to ascertain whether the jurors have become prejudiced, and of how much weight as a practical matter should be given to disclaimers of prejudice by the jurors. Compare *United States* v. *Ogden,* 105 Fed. 371 (E.D. Pa.) with *United States* v. *Montgomery,* 42 F. 2d 254 (S.D.N.Y.). Some of the state cases cited by petitioner are distinguishable on this ground, and the others do not support his broad contention.

A motion for a mistrial during trial is more closely related to a challenge for cause made when the jury is being impanelled than it is to a motion for a new

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trial made after verdict. In cases involving a challenge for cause, the rule has always been that the juryman should be listened to before a decision is rendered. Also, where the matter is brought to light during trial, curative steps are possible, such as the cautionary instructions which were given in the present case.

Our jury system assumes that juries can follow instructions. In cases where the court is required to give cautionary instructions limiting the scope of one defendant's confession so as not to allow it to implicate the other defendants, the judicial presumption has been that the jury follows such instructions. What scientific evidence is available tends to support the view that juries are careful to follow instructions admonishing them to disregard harmful material which they have heard in the course of the trial. Neither legal nor scientific precedent discloses a basis for foreclosing exercise of the trial judge's discretion in this type of issue.

II

In this case, there is also the narrower question whether the fact that petitioner claimed a defense of entrapment restricts or removes the trial judge's discretion. This was the basis for the dissenting judge's views in the Court of Appeals. However, as the majority of the Court of Appeals held, such a defense was not properly presented in this case. The undisputed facts, elicited from the government witnesses since petitioner did not present any witnesses of his own, establish only that the offer to buy or receive proscribed medicine came from a government agent. It has been established law since *Sorrells* v. *United States*, 287 U.S. 435, 441, 451, that such a showing,

without more, is not enough to maintain the defense of entrapment.

ARGUMENT

The problem in this case is one which probably can never be wholly eliminated in a country with a free press. A trial which gave every indication of being a minor routine prosecution of no great interest (see R. 29-30) turned out to have news value. Reporters, on their own, without fault of the prosecution, searched out and published facts about petitioner's past which admittedly the government could not properly put into evidence. Apprised of that fact, the trial judge, at the suggestion of defense counsel, carefully questioned each juror, found that only one had really read both articles, and that only three others knew the contents of one article. The judge came to the firm conclusion in his own mind that the jury was capable of judging the case fairly, uninfluenced by the facts appearing in the news articles. There is in this case no issue as to failure to make appropriate inquiry, no issue as to failure to exercise discretion. As the dissenting judge in the court below stated (R. 64):

> * * * The inquiry was as careful and the responses as positive as one could expect, and if we are to take the jurors' conscientious word for their state of mind, we must assume that all extraneous knowledge of the accused's prior and damaging record was completely banished from the jurors' mind and did not influence their consideration of his only defense of entrapment. * * *

The basic question is, therefore, whether there was room for the exercise of the trial judge's discretion or whether he was required to grant a new trial regard-

less of his reasoned conclusion that the jury could judge the case fairly. Petitioner, in this Court, takes the broad position that the mere fact that damaging inadmissible evidence was seen by some of the jurors *ipso facto* required the grant of a new trial—that no action by the trial court can ever cure prejudicial publicity read by some of the jurors. As we show in Point I (*infra*, pp. 13-24), this broad position finds no support in the cases, and is indeed refuted by the decisions of this Court and of the lower federal courts.

The dissenting opinion below (R. 62-65) raises a narrower issue. Its view is that, because there was a defense of entrapment, "no juror could try this accused on the issue of whether he was in fact induced by the government to commit the act for which he was on trial as if they did not know that his past record and moral traits inclined him toward it" (R. 64). The majority below, on the other hand, found that the government's evidence, which petitioner did not dispute, did not even properly present an issue of entrapment so that, in submitting that issue to the jury, the trial judge accorded petitioner more than his due (R. 57). In view of the fact that petitioner had made no attempt to controvert the fact of sale, but had merely tried (incorrectly, as the majority found) to assert a defense of entrapment on the basis of the government's proof, the court found that there was "no area for prejudice to occupy, even if it existed" (R. 60). In our second point (*infra*, pp. 25-28), we discuss our reasons for believing that this ruling is correct.

I

THAT JURORS HAVE SEEN NEWSPAPER ARTICLES CONTAINING INADMISSIBLE INFORMATION DOES NOT IPSO FACTO REQUIRE A MISTRIAL OR A NEW TRIAL: THE MATTER LIES WITHIN THE DISCRETION OF THE TRIAL JUDGE AFTER CAREFUL INQUIRY OF THE TYPE MADE HERE.

A. A Showing That Jurors May Have Seen Prejudicial Publicity Requires the Trial Judge to Exercise a Discretion Which, If Duly Exercised, Is Entitled to Controlling Weight.

Despite the constant interest of newspapers in criminal prosecutions, this Court has not, since its 1910 decision in *Holt* v. *United States*, 218 U.S. 245, found it necessary to consider that issue with respect to the rights of a defendant in a federal prosecution.[2] We think this fact in itself suggests a recognition of what we conceive to be the rule laid down by *Holt* and followed thereafter with respect to issues of publicity—that the matter is one which lies peculiarly within the discretion of the trial judge, and that a careful exercise of that discretion should not be upset by the appellate courts.

In the *Holt* case, counsel for the defendant, in support of a motion for a new trial, filed his own affidavit that members of the jury who had been allowed to separate during the trial had stated to him that they had read newspaper accounts of the articles in the Seattle press. The judge assumed that the jurors had read the articles, but nevertheless denied the motion.[3]

[2] Different considerations are of course involved in attempts to punish a newspaper for contempt by reason of its publishing of articles relating to a trial. See Note, *Controlling Press And Radio Influence On Trials*, 63 Harv. L. Rev. 840, 848-52; Note, *Contempt By Publication*, 59 Yale L.J. 534.

[3] The articles appear at pp. 66-72 of the record in that case, No. 231, Oct. Term, 1910. The defendant complained in particular of an article which appeared on Sunday, December 20, after both sides

On the same assumption, this Court, in an opinion by Mr. Justice Holmes, held that there was no occasion to overrule the discretion of the trial judge, saying (218 U.S. at 251):

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under conditions of the present day. Without intimating that the judge did not go further then we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong.

In other words, even on the basis that the jurors had read the article containing misinformation, this Court held that the decision as to whether to grant a new trial was one calling for the exercise of the trial judge's discretion in view of all the facts, and that the appellate court would not overrule the trial court's judgment in that respect without some conclusive showing that it was wrong. The *Holt* decision is a dispositive refutation of petitioner's fundamental position that the mere fact that the jury has seen prejudicial publicity *ipso facto* requires a new trial.

The ruling in *Holt* had been foreshadowed by previ-

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had rested on Friday, December 18 (R. 70-72), stating *inter alia* that the defendant would take the stand in his own behalf that coming Monday (see brief of plaintiff in error, pp. 108-116). In his opinion denying the motion for a new trial, the trial judge noted that, before the arguments to the jury, the court had cited one of the reporters for contempt and had interrogated him before the jury concerning the article, which the jurors necessarily knew to be inaccurate, eliciting from the reporter an admission that he had been misinformed. The jurors were admonished not to give heed to unreliable statements published by newspapers (R. 10).

ous decisions. The general authority of the trial court to discharge a jury and the correlative right to try the prisoner again was established at least by 1824, when this Court decided *United States* v. *Perez*, 9 Wheat. 579. The opinion of the Court, delivered by Mr. Justice Story, states, at p. 580:

> * * * We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. *They are to exercise a sound discretion on the subject;* and it is impossible to define all the circumstances, which would render it proper to interfere. * * * [Emphasis added]

and later:

> * * * the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. * * *

See also *Wade* v. *Hunter*, 336 U.S. 684, 689-690.

In *Mattox* v. *United States*, 146 U.S. 140, the Court reversed the refusal of the trial judge to grant a new trial without consideration of tendered affidavits of the jurors that a newspaper article had been read to them after they had been unable to agree upon a verdict, and that thereafter they returned a verdict of guilty of murder. The article mentioned that the defendant had been tried for his life once before. The Court held that the trial court erred in refusing to consider the affidavits, not as impeaching the verdict, but as

establishing the overt fact that the jury had read the newspaper article, and said (146 U.S. at 151):

> * * * We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court; but another ground exists upon which we must not only do this, but direct a new trial to be granted. * * *

The Court was thus ruling, on this aspect of the case, that proof that the jury had seen unfavorable publicity required the trial judge to consider the matter and to exercise his discretion, but that very holding negates the position (which petitioner takes) that such proof in and of itself requires a new trial.

This has been the rule applied by the lower federal courts ever since the *Holt* and *Mattox* decisions. It has been held both that the mere fact that articles dealing with a trial have been published does not compel a new trial, and also that the trial court is not even required to act without some showing that the jurors have seen the allegedly prejudicial publicity.[1] But even on a showing that some jurors have seen newspaper articles containing inadmissible materials, no federal court has held that a new trial must automatically result. Such a showing does require the trial judge to make inquiry (unless the defendant deliber-

[1] *United States* v. *Giovato*, 114 F. Supp. 204 (W.D. Mo.), affirmed, 212 F. 2d 8 (C.A. 8), certiorari denied, 348 U.S. 884; *Hart* v. *United States*, 112 F. 2d 128 (C.A. 5), certiorari denied, 311 U.S. 684; *United States* v. *Keegan*, 141 F. 2d 248 (C.A. 2), reversed on other grounds, 325 U.S. 478; *Welch* v. *United States* 135 F. 2d 465 (C.A. D.C.), certiorari denied, 319 U.S. 769; *United States* v. *Frank*, 151 F. Supp. 866 (W.D. Pa.), affirmed, 245 F. 2d 284 (C.A. 3), certiorari denied, 355 U.S. 819; *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574.

ately waives such right).[5] Failure to make sufficient inquiry[6] or error in the conduct of the inquiry[7] may constitute reversible error. And where it is shown on inquiry that the prejudicial publicity is the result of misconduct by some governmental officer, court, prosecuting attorney, or other government agent, the courts have generally considered that factor sufficient to weigh the balance against the prosecution, in favor of a new trial.[8] And even where the government is not at fault, a trial judge on examination may come to the

[5] For cases which turn largely on waiver, see *Ferrari* v. *United States*, 244 F. 2d 132 (C.A. 9), certiorari denied, *sub nom. Chrispakos* v. *United States*, 355 U.S. 873; *United States* v. *Marrin*, 159 Fed. 767 (E.D. Pa.), modified, 167 Fed. 951, certiorari denied, 223 U.S. 719; *Cohen* v. *United States*, 27 F. 2d 713 (C.A. 2).

[6] *Mattox* v. *United States*, 146 U.S. 140, discussed, *supra*, pp. 15-16.

[7] *E.g.*, *Marson* v. *United States*, 203 F. 2d 904 (C.A. 6); *Krogmann* v. *United States*, 225 F. 2d 220 (C.A. 6).

[8] *Briggs* v. *United States*, 221 F. 2d 636 (C.A. 6) (trial judge issued bench warrant during trial charging perjury to witnesses who testified contrary to statements they had made to the F.B.I. and this information was publicized; held that, since a trial judge is under a great obligation when commenting on the evidence, there should be a rebuttable presumption of prejudice); *Harrison* v. *United States*, 200 Fed. 662 (C.A. 6) (Post Office issued a "fraud" order against the defendant during the trial, which was prominently published and presumably came to the jury's attention); *Griffin* v. *United States*, 295 Fed. 437 (C.A. 3) (papers quoted district attorney as saying men had confessed and ordered to turn state's evidence); *Hensler* v. *United States*, 246 F. 2d 190 (C.A. 5) (United States attorney filed a motion in a civil case, while criminal case was going on, that was prejudicial to the defendant). But cf. *Reining* v. *United States*, 167 F. 2d 362, 365 (C.A. 5), certiorari denied, 335 U.S. 830 (article, besides being report of trial, stated that one of the prosecuting attorneys had declared that one of the defendants had died and that he had said he would take his own life rather than face prosecution; the court held that the trial judge took precautions and his discretion did not appear to have been abused).

conclusion that the potentialities of prejudice are so great that a new trial is warranted.[9]

But we have found no federal decision where an appellate court has overruled the conclusion of the trial judge, after careful inquiry, that a jury was able to try the case fairly despite adverse publicity not attributable to government officials. To the contrary, the decisions are in accord with the ruling below that where, as here, the adverse publicity did not result from action by government agents, and where the court after inquiry satisfied itself that the jury could try the case fairly, the judgment of the trial court denying a motion for a new trial is entitled to controlling weight. *Holt* v. *United States*, 218 U.S. 245, discussed, *supra*, pp. 13-14; *Rowley* v. *United States*, 185 F. 2d 523 (C.A. 8) (some of the jurors had read an article which stated that the defendant was an ex-convict; the District Court denied a motion for a mistrial and the Court of Appeals, in a brief opinion, affirmed); *United States* v. *Postma*, 242 F. 2d 488, 495 (C.A. 2), certiorari denied, 354 U.S. 922 (articles said that potential witness for the government had stabbed himself after receiving threats; all but two of the panel had read at least one article about the case; all said that they would not be influenced thereby); *United States* v. *Allied Stevedoring Corporation*, 241 F. 2d 925, 934-935 (C.A. 2), certiorari denied, 353 U.S. 984 (press release stated that a previous president of the local

[9] *E.g.*, *United States* v. *Montgomery*, 42 F. 2d 254 (S.D. N.Y.), where a newspaper article, with headline "Swindler Vause Once Hired Chief Witness Against Him," carried defendant's picture with description of him as swindler, jailbird, disbarred lawyer, ex-convict, fugitive from justice, etc. Since several of the jurors had read the articles, and at least one was not able to satisfy Judge Woolsey as to his impartiality, the motion for mistrial was granted.

union also had been indicted for tax evasion); *Christensen et al.* v. *United States*, 16 F. 2d 29, 30 (C.A. 9) (news story on attempt to bribe a juror). See also *Bullock, et al.* v. *United States*, C.A. 6, decided February 27, 1959, slip op., pp. 16-19; *Reining* v. *United States*, 167 F. 2d 362, 365 (C.A. 5), certiorari denied, 335 U.S. 830, discussed *supra*, footnote 8; *United States* v. *Pisano*, 193 F. 2d 355, 361 (C.A 7); *United States* v. *Carruthers*, 152 F. 2d 512, 519 (C.A. 7), certiorari denied, 327 U.S. 787, rehearing denied, 327 U.S. 817, 819; *Dillon* v. *United States*, 218 F. 2d 97, 103 (C.A. 8), certiorari dismissed, 350 U.S. 906; *Stunz* v. *United States*, 27 F. 2d 575, 577-578 (C.A. 8); *Van Riper* v. *United States*, 13 F. 2d 961, 967 (C.A. 2), certiorari denied, *sub nom. Ackerson* v. *United States*, 273 U.S. 702; *United States* v. *Hirsch et al.*, 74 F. 2d 215 (C.A. 2), certiorari denied, 295 U.S. 739; *Bratcher* v. *United States*, 149 F. 2d 742 (C.A. 4), certiorari denied, 325 U.S. 885. See, generally, 86 A.L.R. 928; 31 A.L.R. 2d 417; Note, *Criminal Law: May Jurors Read Newspapers?*, 5 U. Fla. L. Rev. 432; Note, *Controlling Press And Radio Influence On Trials*, 63 Harv. L. Rev. 840, 842, 843, 846-848.[10]

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[10] In the potentially more dangerous situation involving personal contact with a juror for the purpose of bribing or influencing him, this Court has recently held that, while the presumption is that prejudice ensued, the trial judge must still conduct a hearing and exercise his discretion. *Remmer* v. *United States*, 347 U.S. 227, 229-230. In that case one of the jurors reported to the judge that he had been contacted by a third person attempting to bribe him on defendant's behalf. The judge, together with the prosecutor and the F.B.I., investigated without notifying the defendant. This Court remanded to the trial court for a hearing to be conducted on the possibility of prejudice, with the government to carry the burden of showing affirmatively that there was no prejudice. On appeal from the trial judge's determination, the Court again reversed and ordered a new trial on the ground that the earlier mandate had been construed too narrowly by the trial judge. *Remmer* v. *United States*, 350 U.S. 377.

B. Where, as Here, the Fact of Prejudicial Publicity Comes to Light During the Trial, So That the Judge Has the Opportunity to Question the Jurors Closely and Give Cautionary Instructions, There Is No Reason to Assume Prejudice.

In cases where there is a motion for a new trial *after verdict,* based on allegations that the jury had seen or utilized prejudicial material during their deliberations, the line between the rule permitting proof of the fact of improper outside influence and the rule against allowing a juror to impeach his own verdict (see *Mattox* v. *United States,* 146 U.S. 140, discussed *supra,* pp. 15-17) is not an easy one to maintain. It is even more difficult to make this distinction where the fact that jurors had seen improper materials comes to light during the course of the jury's deliberations. For this reason, where the motion is made after verdict, the courts tend more readily to assume prejudice on a mere showing that jurors have read or heard prejudicial matter, since there is a reluctance to inquire into matters which may lead to impeaching the verdict. Where, however, the fact of adverse publicity is brought to light during the course of the trial, there is no problem of impeaching a verdict—so that the jurors can be closely interrogated and, in addition, the judge can give cautionary instructions to the jury to disregard evidence not of record. There is therefore less reason to assume prejudice during the trial than there is after the trial.

This distinction may be illustrated by comparing *United States* v. *Ogden,* 105 Fed. 371 (E.D. Pa.) with *United States* v. *Montgomery,* 42 F. 2d 254 (S.D.N.Y.). In *Ogden,* the trial judge granted a motion for a new trial made after a verdict had been returned, and refused to allow examination of the jurors on the issue of prejudice, since this would be allowing the jurors

to impeach their own verdict. In *Montgomery*, although the newspaper articles read by the jurors were a veritable catalogue of every conceivable prejudicial statement, the trial judge did not grant the motion for mistrial, made before the jury had retired, on a mere showing that the jurors had in fact read the articles. He proceeded to examine them as to their ability to consider the case impartially, though resolved to grant the motion if any doubt remained in his mind that any juror could not remain unaffected. Only when this proved to be the result was a mistrial awarded.

Some of the state cases cited by petitioner (Pet. Br. 10) rest on this distinction. This is particularly true of *People* v. *Wong Loung*, 159 Cal. 520, where the affidavits in support of the movant's contention were rejected, but the court assumed prejudice, after verdict, from the bare circumstance that at least one juror had read the article. See the distinction drawn by the California Code between inquiry before trial, West's Ann. Cal. Codes, Vol. 49 (Penal Code), Section 1081, and reception of the juror's affidavit after verdict, West's Ann. Cal. Codes, Vol. 16 (Code of Civil Procedure), Section 657(2). To the same effect is *Sprinkle* v. *State*, 137 Miss. 731, where it was shown, in support of a motion for new trial, that prior to reading the article in the jury room the vote was eleven to one for conviction, and thereafter it was unanimous.[11]

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[11] In *Commonwealth* v. *Landis*, 12 Phila. Reports 576, a lower court opinion granting a motion for new trial, it was noted that the American practice is more liberal than the English, in that more leeway is permitted after a verdict is recorded to attack the verdict on such grounds. In *Babb* v. *State*, 18 Ariz. 505, and *Golden* v. *State*, 89 Tex. Cr. 525, cited by petitioner, there were other

A motion for a mistrial on grounds of improper publicity, made during the trial when the judge may examine and admonish the jurors, bears closer resemblance to challenging the jurors for cause when they are being impanelled than it does to a motion for a new trial made after the verdict. Where a challenge for cause based on prejudice from antecedent knowledge is made, it has long been the rule that:

> * * * light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule. *They ought to hear the statement made by himself* or given by others, and conscientiously determine, according to their best judgment, whether in general men under such circumstances ought to be considered as capable of hearing fairly, and of deciding impartially, on the testimony which may be offered to them, or as possessing minds in a situation to struggle against the conviction which that testimony might be calculated to produce. * * *

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grounds for reversal and the decisions contain no detailed discussion of the procedure to be followed.

People v. *Hryciuk*, 5 Ill. 2d 176, affirms the awarding of a new trial by the lower court pursuant to the post-conviction remedies in Illinois. The original conviction was obtained in 1939. Besides being in essence an affirmance of the exercise of the lower court's discretion, the court states that the prosecution was responsible for the information's reaching the press. The opinion speaks in terms, not of requiring a new trial in every such instance, but of not denying a new trial in every such instance.

[emphasis added; *United States* v. *Burr*, 25 Fed. Cas., No. 14,692g, at 51].

See also *Reynolds* v. *United States*, 98 U.S. 145, 155-156. In *Holt* v. *United States*, 218 U.S. 245, 248, the Court, in addition to its ruling on the motion for a new trial (discussed *supra*, pp. 13-14), held that there was no error in failing to exclude for cause a juryman who said he had read the papers concerning the case but that evidence could change his opinion very easily. Both with respect to challenges for cause at the outset and to adverse publicity during the trial, the trial judge must weigh disclaimers of prejudice against his own objective conclusions about the fatal quality of the infection of outside knowledge.

It has never been the rule in criminal cases that the mere fact that a jury has seen or heard inadmissible evidence necessarily and *per se* requires a new trial. In *Holt* v. *United States*, 218 U.S. 245, 249, the jury was present when the court took testimony on the admissibility of a confession which was ultimately excluded as improperly obtained. This Court held that, in view of the strong cautionary instructions that the preliminary hearing had no bearing on the question the jury had to decide, the course followed by the trial judge could not be deemed reversible error. Our system of jury trials is based on the assumption that juries can and will follow instructions of the trial judge, even with respect to so difficult a matter as considering only against one defendant a confession implicating another. *Delli Paoli* v. *United States*, 352 U.S. 232, 241-243; *Opper* v. *United States*, 348 U.S. 84, 95. There is less difficulty in requiring a jury, by proper instructions, to disregard newspaper publicity

which does not have the dignity of evidence offered in court. The public has a fund of scepticism regarding isolated news articles, as the remarks of some of the jurors on interrogation in this case indicate (see *supra*, pp. 5-6). Such experimentation as has been conducted, while inconclusive, tends to confirm the view that jurors are capable, in general, of disregarding harmful material under appropriate guidance from a trial judge. See Weld & Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury*, 53 Am. J. Psych. 518, 526 (fn. 4).

In short, precedent, both legal and scientific, does not demand a positive conclusion that prejudice is likely. The matter is one peculiarly a subject for the informed discretion of the trial judge. As was said in a different connection, a great amount of discretion is entrusted to the trial judge in the federal judiciary, on the supposition that a high degree of competence may be assumed, since a lack of that supposed competence can never be compensated for by appellate review, no matter how stringent. *Michelson* v. *United States*, 335 U.S. 469, 487-488.

When, as in this case, the trial judge conducted a careful inquiry (*supra*, pp. 4-6) and reached the firm conclusion on the basis of his personal interrogation that the jury was able to try the case fairly (*supra*, pp. 6-7), and where he cautioned the jury to decide the case only on the evidence before them (*supra*, pp. 5-8), there is no reason to overturn his considered judgment.

II

THE FACT THAT PETITIONER, WITHOUT BASIS IN THE EVIDENCE, CLAIMED A DEFENSE OF ENTRAPMENT DOES NOT RENDER THE PUBLICITY SO PREJUDICIAL THAT ACTION BY THE TRIAL JUDGE COULD NOT CURE IT.

As noted at the outset (*supra*, p. 12), the dissenting judge below felt that, in view of the defense of entrapment in this case, the newspaper accounts seen by the jurors were so prejudicial that a new trial was required as a matter of law, regardless of the careful inquiry by the trial judge and regardless of the honest belief by the jurors that they could try the case fairly. The majority below were of the view that there was in this case no evidence tending to support a defense of entrapment, and therefore no area in which this claim of special prejudice could be said to operate. In the light of these specific rulings below, we deem it appropriate to discuss the defense of entrapment in relation to the issue of publicity on which the Court granted certiorari (*supra*, p. 2), even though the Court did not grant review on the direct issue with respect to entrapment raised by petitioner (Pet. 2, second question presented).

We submit that the court below was correct in ruling that the defense of entrapment was not properly in this case. The facts as recited in the Statement (*supra*, pp. 2-3) need not be repeated. The defense called no witnesses, and the only testimony about the alleged transactions was given by a government witness, Robert E. Keating, an inspector for the United States Food and Drug Administration. He stated that he was introduced to petitioner by a third party, as a friend, on April 18, 1956. He identified himself as a salesman. At their second meeting, on April 23, 1956, he asked petitioner for "stay-awake" pills because he was

about to undertake a long journey by car. After petitioner suggested No-Doz and coffee and was told that that had been tried to no avail, the subject was dropped and the conversation turned to other matters. Then, as the inspector was about to leave, petitioner called him back into the apartment and gave him some tablets and pills, with instructions for use. On May 1, 1956, the inspector met petitioner for the third time and asked for more of the pills, at which time he was sold a quantity for $15. It is significant that, the first time petitioner was asked for pills, he had some in his possession. It is also significant that on the later occasion, when petitioner said he did not have the needed quantity on hand, the inspector asked if he would have to purchase them at a drug store, and if he could go along to save an extra trip. Petitioner, although saying that he would probably have to purchase them at a drug store, declined to let the inspector come along. This indicates that petitioner had a source of supply, either through illegally obtaining them from legitimate sources, or from purely illegitimate sources.

On this evidence, the claim of entrapment reduces itself to the proposition that the mere fact that the offer to buy proscribed medicine came from a government agent, in and of itself, raises an issue of entrapment. Such, however, is not the law. As this Court said in *Sorrells* v. *United States,* 287 U.S. 435, 451, "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises." The Court had previously pointed out in that case (287 U.S. at 441):

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. * * *

To raise an issue of entrapment, there must be some showing, either from the government's own proof (as in *Sherman* v. *United States*, 356 U.S. 369) or by the proof offered by the defendant, that "the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials." *Sherman* v. *United States*, *supra*, at 372. There was no such showing here from the government's evidence, and petitioner made no attempt to make a showing on his own behalf. There was no proof of unusual circumstances, of playing on petitioner's sympathy, of pressure applied to the weakness of an unwilling suspect, or trickery to lure an unfortunate innocent into the commission of a crime. The inspector did no more than afford petitioner an opportunity to commit the offense. In submitting the issue of entrapment to the jury, the judge accorded petitioner more than was his due, since petitioner had no right to have the jury consider this issue on the evidence presented. Cf. *United States* v. *Pisano*, 193 F. 2d 355, 361 (C.A. 7). Petitioner cannot, therefore, contend that he was prejudiced in the minds of the jury when it considered his affirmative defense of entrapment after having seen the newspaper articles. The majority below correctly held that there was not, on the facts of this case, any special circumstances arising out of the defense of entrapment, which would make it impossible for the jury, adequately interro-

gated and adequately cautioned, to decide the case fairly on the evidence presented in court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL J. KOMIVES,
Attorneys.

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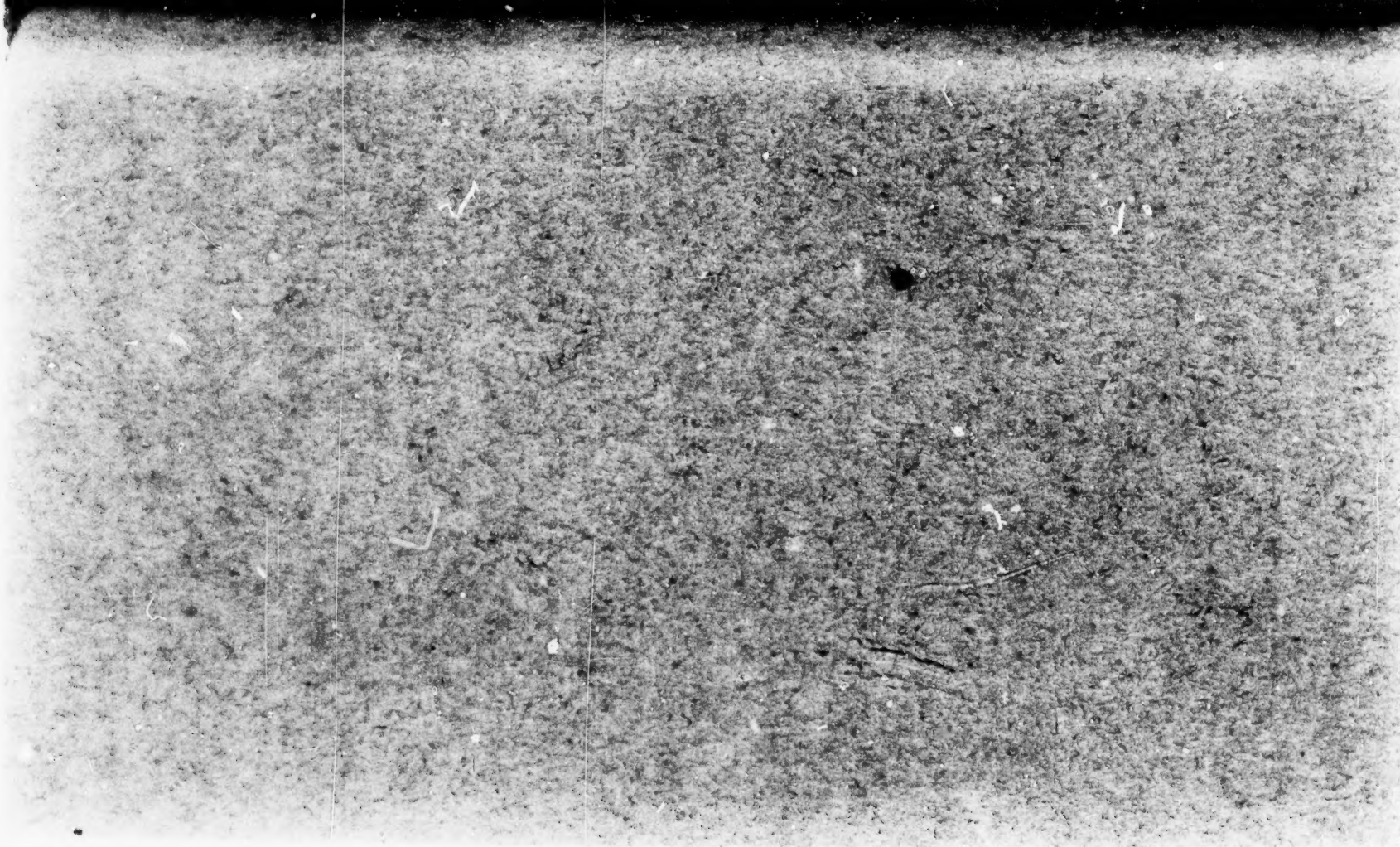

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BRIEF ON MERITS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 383

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

GEORGE J. FRANCIS,
OMER GRIFFIN,
FRANCES DE LOST,
817 Farmers Union Bldg.,
Denver 3, Colorado,

Counsel for Petitioner.

EASTWOOD PRINTING CO. • 2854 LARIMER • DENVER 5, COLO.

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Opinion Below

The opinion of the Court of Appeals (R. 54-65) is reported at 258 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals was entered July 22, 1958, (R. 65). The petition for writ of certiorari was filed September 19, 1958, and the petition was granted

November 17, 1958. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a criminal trial to a jury with character not in issue a defendant is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter.

STATUTE INVOLVED

The statute under which the petitioner was convicted was the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1042, 21 U.S.C. 331 (k); 52 Stat. 1051, 21 U.S.C. 353 (b) (1) (B). These sections provided:

> Prohibited Acts:
>
> 331. The following acts and the causing thereof are hereby prohibited:
>
> (k) ~~The~~ alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.
>
> 353. Exemptions in case of drugs and devices —
>
> (b) (1) A drug intended for use by man which —
>
> (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practicioner licensed by law to administer such drug;

STATEMENT

On September 30, 1957, the petitioner who did not take the stand or present evidence of his own was found guilty (R. 4) on two counts of a three count information which had charged him with misbranding through indiscriminate dispensing of drugs without prescription in violation of said sections 331(k) and 353(b)(1) (B). Petitioner was committed for imprisonment on each of said two counts for a period of six months, the periods to run concurrently (R. 6-7). The petitioner appealed in part on the ground that he had been denied a fair trial by reason of the fact that members of the jury during the course of the trial read certain newspaper articles which set forth defamatory matters as to the petitioner and related that the petitioner had been convicted of felonies on two previous occasions (R. 1). The Court of Appeals for the Tenth Circuit affirmed the judgment and sentence holding that petitioner was not denied a fair trial by reason of said articles, Judge Murrah dissenting (R. 54-65).

SUMMARY OF ARGUMENT

The acts of the jury in reading such newspaper articles deprived the petitioner of some of the most vital elements of a fair trial. It was his right that the ju consider his case only from evidence received in open court. It was also his unqualified right under the circumstances that his previous convictions and alleged criminal activity not be brought to the attention of the jury. If the same matters were to have been raised in open court, with the defendant not taking the stand or presenting evidence on his behalf, a new trial would have resulted. No valid reason exists why this situation should be an exception.

ARGUMENT

WHEN A JURY DURING THE COURSE OF A CRIMINAL TRIAL READS DEFAMATORY MATTER INCLUDING STATEMENTS THAT THE DEFENDANT HAS HAD PREVIOUS FELONY CONVICTIONS, SUCH MATTER BEING INADMISSIBLE, THE DEFENDANT IS ENTITLED TO A NEW TRIAL OR MISTRIAL.

This case in brief concerned a trial of the petitioner for indiscriminate dispensing of drugs. The jury having been impaneled, the respondent presented its case alleging that on two occasions, the petitioner had dispensed drugs. The testimony of the chief government witness (R. 8-26, 32-34) was of such a nature that on request of petitioner's counsel an instruction on entrapment was given (R. 38). After the first day of trial, and after petitioner's counsel called the court's attention to the fact that members of the jury in the jury room were grouped about a newspaper, reading it (R. 27), it was discovered that two articles in separate newspapers (R. 52-53) had been read by members of the jury.

The jury being individually interrogated it was discovered that six of the jurors read one of the articles and two of the six read both. The government conceded having spoken to the newspapers but asserted this to have been only as to matters brought out in court, not as to the inadmissible and defamatory matters (R. 27). Those who were asked as to prejudice, denied that they had been prejudiced (R. 39-51). The newspaper articles stated: that petitioner had a record of two previous felony convictions; that while serving a forgery conviction petitioner testified before an Oklahoma state legislative committee

that he had only a high school education and that he wrote and passed prescriptions for dangerous drugs with ease; that petitioner had acted as physician and prescribed restricted drugs for one Hank Williams the country singer before his death; that petitioner was arrested with his wife and that she had been convicted on the drug charges in the same Federal court and she had been sentenced to 60 days in jail; and that "court attaches" said there was no evidence he was a doctor (R. 52-53).

The same information offered in open court would have been considered prejudicial since derogatory character evidence or evidence of previous criminal activity or conviction would not have been admissible. The authority for this proposition is found in *Michelson v. United States*, 335 U.S. 469, 475, 476, where this Court stated:

> "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." p. 475
>
> "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." p. 476

See also, in accord with the above, the following cases, to the effect that such information is prejudicial error when presented in open court: *United States v. James*, 208 F. 2d 124, 125 (C.A. 2); *United States v. Rattan Co.*, 159 F. 2d 656, 658, (C.A. 2), cert. den. 331 U.S. 831; *Mackrath v. United States*, 103 F. 2d 495, 496 (C.A. 5).

Wigmore summarizes the thought on this point, *Wigmore on Evidence*, 3rd ed., 1940, '57, p. 456: "The rule,

then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."

As indicated above the rule as to the introduction of such matters in the in-court-situation is fixed and universally accepted. Any distinction or comparison that can be drawn between the in-court-situation where such matters are disclosed in open court, or on the other hand, the out-of-court situation which takes place in the jury room (R. 40) or home of a juror indicates that the firm rule as applied to the in-court-situation should be applied even more firmly in a jury room or out-of-court situation. In court, the disclosure would be subject to judicial control and would be over with in a matter of moments. Out of court the juror has the opportunity to read and re-read if he wishes. He has the chance to discuss with others including other members of the jury. He may at his leisure reflect upon what he has heard in open court in the light of what he now reads or hears out of court. Any deliberation the juror were to make in the jury room or out-of-court situation could not help but be tainted by the information so received. Consciously or subconsciously, matters ascertained in such fashion would weigh in the juror's thoughts.

It might be argued that the in-court-situation differs in that the prosecuting attorney in the majority of instances is at fault. This argument would not be sound since the reason for the rule is not to punish the misconduct of the wrongdoer but to rectify a wrong done the defendant and protect him in his well-established rights. This notion of fault has been used in the past, *United States v. Postma*, 242 F. 2d 488, 495 (C.A. 2), cert. den. 354 U.S. 922, with comment by Justice Frankfurter, where the fact that the government made no disclosures to newspapers was deemed relevant, and also in *United States v.*

Leviton, 193 F. 2d 848, 866 (dissenting opinon of Justice Frank), cert. den. 343 U.S. 946 with comment by Justice Frankfurter. Such arguments tend only to lead astray from the real question as to whether or not a fair trial was denied the defendant. Perhaps for this very reason the decision in the *Leviton* case, which did not involve matters as here involved, chose to use the "clear and present danger" test as to whether that defendant had been deprived of a fair trial, p. 857, citing *Ex Parte Craig*, 263 U.S. 255; *Baltimore Radio Show v. Maryland*, 67 A. 2d 497, cert. den. 338 U.S. 912, with comment by Justice Frankfurter.

The "clear and present danger" test, prior to the *Leviton* case had been confined to cases involving punishment of newspapers or other media for criminal contempt. Such rule has no application in this type of case, *United States v. Leviton*, 193 F. 2d 848, 866 (dissent of Justice Frank), Forer, *A Free Press and a Fair Trial*, 39 A.B.A. J. 860, 843, Comment, 59 Yale L.J. 534, 535-536, and see *Shepherd v. Florida*, 341 U.S. 50, 52. The criminal contempt cases, moreover, rely on the assertion that "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376. Such cases involve the effect on the judge, not the jury, of out of court news items and are concerned primarily with the punishment of newspapers, not the rights of the defendant. A notion of fault or punishment has no place here. It is that a wrong to the defendant resulted and that he was thereby deprived of a basic right.

The trial court concluded after interrogation that the jurors were not prejudiced (R. 31) and for that reason denied the motion of Petitioner for a new trial. When such matters come out in open court, the jury is not polled to determine the impact of the news item. Moreover as

Judge Murrah stated in his dissent, the untrained human mind could not disregard the alleged past criminal record of the petitioner. It would be expecting too much of a juror to admit prejudice under the circumstances (R. 64). Further, the defense of entrapment permitted by the trial court becomes valueless in the face of such disclosures. How can a plea of entrapment be made effectively to a jury that has read of a past criminal record? If one reason for excluding evidence of a defendant's past criminal record is that though relevant ". . . such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. United States*, 335 U.S. 469, 475, such a reason should have still more persuasive application to the situation where a defense of entrapment has been permitted, and where predisposition of the defendant is so relevant. *Sherman v. United States*, 352 U.S. 369, 373.

The Supreme Court of Illinois in *People v. Hrycink*, 5 Ill. 2d 176, 125 NE 2d 61, (a decision reviewing authorities on the subject), had a somewhat similar case in which jurors during trial read of the criminal background of the defendant and did not admit prejudice on being interrogated. The Supreme Court there chose to disregard statements of the jurors and reversed the trial court, noting:

> "In any event the statement of a juror that reading a prejudicial newspaper article has not influenced him should not be considered conclusive. Basing the determination solely upon the statements of the jurors ignores and evades the real issue. The determination of that issue must, therefore, rest in the sound judicial discretion of the court to reach an inference, from all the facts and circumstances, that a fair trial has, or has not, been interfered with. Such inference is

however, a judicial discretion, the abuse of which will constitute reversible error. p. 184

"Obviously the most controlling fact or circumstance to create an inference is the character and nature of the prejudicial statements. p. 184

"It would be more in accord with human experience to suspect that, try as they might, such emotions would linger in the consciousness of the most honest juror and tempt him to disregard the fundamental requirement of a fair trial and resolve any doubts he might have against the defendant. That fundamental requirement is constitutionally guaranteed to the guilty and innocent alike. p. 185."

Much the same sort of reasoning is reflected in the statement of Justice Frankfurter, dissenting, *Craig v. Harney*, 331 U.S. 367, 392: "The fact that it cannot be demonstrated how the delicate balance of an adjudication was tampered with, or whether it was, does not prove that it was not tampered with."

Prejudice, for well accepted reasons, is assumed in a case of this sort where disclosures of criminal background are made in open court. The notion that prejudice should be established by petitioner in a jury room setting is inconsistent with the usual rule of the in-court-situation. It imposes a burden on the defendant which heretofore was not his. The difficulty of tracing and bringing out from jurors the effect of such publication of criminal background has been well summarized:

"Accurately to prophesy the influence and effect on the minds of jurors of what I have called the contraband information contained in these objectionable articles is, in my opinion, as impossible as it would be to foretell with any certainty the course of an infectious

disease among them." *United States v. Montgomery*, 42 F. 2d 254, 256 (D.C.S.D. N.Y.).

The *Montgomery* case also involved our situation of a past criminal record being read by a jury.

Those cases which involved disclosures to jurors during trial by newspapers or otherwise of the criminal background of the defendant, and in which new trials were thereupon granted, either chose to disregard statements of jurors that they were not prejudiced or deemed them irrelevant: *People v. Hryciuk*, 5 Ill. 2d 176, 184, 185, 125 NE 2d 61; *People v. Wong Loung*, 159 Calif. 520, 526-528, 114 Pac. 829; *Golden v. State*, 89 Tex. Crim. 525, 528-529, 232 SW 813; *Sprinkle v. State*, 137 Miss. 731, 742-744, 102 So. 844; *United States v. Ogden*, 105 Fed. 371, 373 (D.C. E.D., Pa.); *Babb v. State*, 18 Ariz. 505, 512-513, 163 Pac. 259; *Commonwealth v. Landis*, 12 Phila. Reports 576; *United States v. Montgomery, supra*. Also, such information was commented on in *Mattox v. United States*, 146 U. S. 140, 150, reversed on other grounds, with this Court stating: "It is not open to reasonable doubt that the tendency of the article was injurious to the defendant." The cases in this paragraph did not resolve the issue by taking statements of the jurors as conclusive but rather concluded that the well accepted rule excluding such evidence had been violated and therefor the defendant had been denied a fair trial. Some comments from the cases in this paragraph are set forth in the footnote below.*

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*__People v. Wong Loung__, . . . These allegations, even if true, could not have been received in evidence at the trial . . . No defendant should be convicted "on general principles" or because he is an undesirable citizen. This rule is so perfectly consonant with every rational man's sense of justice as to be axiomatic . . . pp. 525-526

__Commonwealth v. Landis__, A jury must try the cause according to the law and evidence. To that they are oath bound. p. 577

Not only would the test of prejudice verbally verified be inconsistent in the out-of-court situation but the interrogation of the jurors itself could well affect a defendant adversely. To probe into the juror's feeling could not help but impress the news item more definitely in his mind. Furthermore there is the very real likelihood of arousing the antagonism of a juryman by thorough questioning on behalf of the defendant. The few questions that petitioner's counsel dared ask of several of the jurors were asked with hesitation and to petitioner did not illustrate the impartiality of the jurors as the circuit court states, but rather illustrates the most delicate way in which petitioner's counsel was forced to proceed, and the hopelessness of such pursuit (R. 51, 58). It is a task comparable to asking a judge to disqualify himself for prejudice. A task which in the doing can easily create or enhance prejudice but not result in disqualification.

Petitioner's counsel found no case in which defendant did not take the stand, in which the criminal record was read or ascertained and in which a new trial was denied

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Sprinkle v. State, There is no difference between the jury getting this information from a newspaper and getting it from the testimony of witnesses. This was incompetent testimony thrown into the balance, obtained by a jury, probably innocently though not lawfully. p. 743

United States v. Ogden, It is unnecessary to say that such comments upon a pending case violate the elementary rules that demand justice and fair play to a man accused of crime. Under our system of jurisprudence . . . cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay, and it is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him on which no evidence has been offered . . . p. 374

Babb v. State, It was new matter, foreign to the issue on trial, and could not, by any rule of evidence, have been introduced before the jury. p. 512

except for *Rowley v. United States*, 185 F. 2d 523, (C.A. 8) in which the defendant was referred to as an "exconvict." The case, in which the defendant appealed *pro se*, does not disclose if character had been put in issue. In any event this petitioner can only disagree with that decision. The circuit court cited *Gicinto v. United States*, 212 F. 2d 8 (C.A. 8), cert. den. 348 U.S. 884, and *United States v. Carruthers*, 152 F. 2d 512 (C.A. 7) but neither case is authority on these facts. In the *Gicinto* case there was no evidence that the article had been read p. 10 and in *Carruthers* the one juror who read could not remember the matters therein contained p. 519. Both courts so found in their rulings.

Support for our position on this question is found in the concurring opinion of *Shepherd v. Florida*, 341 U.S. 50, 53. A matter of equal importance to the one presented here, the reading of an alleged confession of the defendants, which confession was not introduced into evidence, was considered by the concurring opinion as in itself grounds for a new trial. To hold otherwise and permit the statements of jurors to control in matters that actually are prejudicial *per se* would substitute the conditioned, subjective reactions of jurors for the constitutional guarantees. Such matters must be considered as "ineradicably prejudicial", dissenting opinion of Justice Murrah (R. 65).

Assuming that the instant case involved only the matters presented in open court, can it be argued that the frame of mind of the jurors would have been the same had not the jurors read the newspaper articles presented in this case? Were it not suggested that the defendant in court has a criminal record, that his wife has been convicted on the same charges in the same court, that he previously prescribed and passed prescriptions for dangerous drugs, that he prescribed dangerous drugs for the well

known Hank Williams before his death, any jury would inevitably have a far different conception of the defendant than in the instant case. The delicate balance the law strives to maintain is irrevocably destroyed by such disclosures. Burden of proof, confronting of witnesses, withholding of character evidence, credibility of witnesses — all of these elements of a fair trial are gravely impaired.

The course of a trial can turn on many events and disclosures brought out in court. The reception of "evidence by newspaper" can alter the course of these events. As an example, the government's chief witness made an incredibly inconsistent statement resulting in withdrawal of the second count of the information and its dismissal (R. 6). First, this witness testified that he had placed certain drugs in a *prescription* type vial and sealed them in an envelope immediately after obtaining them from petitioner (R. 15, 16-19). When this witness broke the seal in open court he was unable to identify the drugs. On being recalled to the stand later, this same witness said he could now identify the drugs. He could do so, he said, because he had refreshed his recollection from his report. These drugs he now testified he had placed in an *aspirin* type bottle, that he knew so because he had written out his report the next day with the *aspirin* type bottle before him (R. 32-33). This conflicted with his statement of placing the drugs in a *prescription* type vial containing the drugs in a sealed envelope. If he had previously sealed the bottle, how could he, thereafter, have the bottle visible before him on his desk.

This point might have had weight as going to the credibility of the chief witness. Would it have the same weight if the jury read what it read, or if it had not? The balance of evidence achieved during trial, as in this instance, can easily be shifted by such "newspaper evidence." That

those balances were or were not affected is not subject to proof. But it cannot be denied there could easily have been such a tendency.

Trial by newspaper is not inevitable and encroachments on elements of a fair trial should not be permitted as necessary evils. The manner of tempering the impact of newspaper articles on juries during trial is not within the scope of this appeal. The concern here is that, guilty or not, a defendant must be given his right to a fair trial, trial by newspaper notwithstanding.

CONCLUSION

It is respectfully submitted, for the reasons above given, that the judgment of the lower court be reversed.

George J. Francis,
Omer Griffin,
First National Bank Bldg.,
Frances De Lost,
817 Farmers Union Bldg.,
Denver 3, Colorado,

Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 383

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

GEORGE J. FRANCIS,
FRANCES DE LOST,
817 Farmers Union Bldg.,
OMER GRIFFIN,
First National Bank Bldg.,
Denver 3, Colorado,
Counsel for Petitioner.

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ARGUMENT

I.

NO AUTHORITY EXISTS THAT IT IS ENTIRELY WITHIN THE DISCRETION OF THE TRIAL COURT TO GRANT OR DENY A MOTION FOR MISTRIAL WHEN THE JURY READS OF DEFENDANTS ALLEGED PAST CRIMINAL BACKGROUND AND CONVICTIONS. THE DISTINCTIONS IN THE ANSWER BRIEF ARE NOT VALID.

Respondent takes the firm position that in *Holt v. United States*, 218 U. S. 245, this Court's decision formed a rule to the effect that the above captioned matters were within the trial court's discretion and should not be upset by appellate courts, and that the *Holt* case was dispositive herein, pp. 13 and 14 of the government's brief. A careful reading of the decision of the *Holt* case is necessary in order to determine what the court actually ruled. In the *Holt* case, the pertinent portion of the decision, pp. 250-251, begins with the Court's consideration of one of the appellant's grounds for new trial, precisely, that the trial court had erred in permitting the jury to separate though appellant had failed to except to such separation. Appellant's counsel in support of his ground for new trial, i.e., the separation of the jury, submitted further his affidavit stating that members of the jury had stated to him that they had read newspapers ". . . with articles on the case while the trial was going on." pp. 250-251. The contents or import of the articles is not set forth in the decision. The decision is difficult to follow and therefore pertinent provisions are set forth at length:

> "The court refused to receive counter affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the *public prints* is so obvious, that *for the purpose of passing on the permission to separate* it may be assumed that they did so in this case.
>
> "We are dealing with a motion for a new trial, the denial of which cannot be treated as more than a matter of discretion or as grounds for reversal, except in very plain circumstances indeed (citing cases). It

would be hard to say that this case presented a sufficient exception to the general rule. The judge did not reject the affidavit, *but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion*, it is to be remembered that the statutes or decisions of many States expressly allow the separation of the jury even in capital cases. Other States have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. p. 251." (Emphasis supplied)

From a reading of the above, Petitioner interprets the decision to say that the trial court had discretion to permit a jury to separate, that the trial court did not abuse its discretion in permitting the jury to separate, nor did it abuse its discretion in denying a motion for new trial which motion asserted error in permitting the jury to separate. The *Holt* case is no more authority on the point involved in the instant case than *Mattox v. United States*, 146 U. S. 140. See also *M'Henry v. United States*, 276 F. 761, 764 (C.A.D.C.), as to further deliniation of "public prints", and also *Darcy v. Handy*, 351 U. S. 454, 457, 462.

The position of petitioner as to the *Holt* case is further supported by an analysis of the government's cases pp. 18-19 of its brief. In the thirteen cases cited in support of the government's position that these matters are discretionary with the trial court, ten cases do not cite the *Holt* decision in that connection. Of the remaining three, *United States v. Hirsch, et al.*, 74 F. 2d 215, 218 (C.A. 2), certiorari denied, 295 U. S. 739 cites the *Holt* case to the effect that a motion for withdrawal of a juror is addressed

to the court's discretion: *Bratcher v. United States*, 149 F. 2d 742, 746 cites the *Holt* case for the rule that the court has discretion in denying a motion for new trial, and *Bullock v. United States*, (C.A. 6) decided February 27, 1959, slip op., pp. 16-19 is not available to petitioner.

It is significant in reading through the *Holt* case and the cases cited on pp. 18-19 of the government's brief that none of the cases involved the matter here involved, that is the reading by jurors during the course of trial of the defendant's past criminal activities and convictions except for *Rowley v. United States*, 185 F. 2d 523 (C.A. 8) which case has never been cited for that point. (Comment on the Bullock case is not possible for the reason given above.)

Taking the cases set forth on pp. 18-19, the following is disclosed: *Christensen et al. v. United States*, 16 F. 2d 29, 30 (C.A. 9) no showing that the news item was read; *Reining v. United States*, 167 F. 2d 362, 365 (C.A. 5), certiorari denied, 335 U. S. 830, where the trial court finds "... nothing so inflammatory here so as to convince us that the purity of the trial was destroyed.", *United States v. Pisano*, 193 F. 2d 355, 360-361 involving a "misleading article"; *United States v. Carruthers*, 152 F. 2d 512, 518-519 (C.A. 7), certiorari denied, 327 U. S. 787, rehearing denied, 327 U. S. 817, 819 where the juror who read stated he could remember nothing of the article except as to a motion in court; *Dillon v. United States*, 218 F. 2d 97, 103 (C.A. 8), certiorari dismissed, 350 U. S. 906 where the juror stated what he read did not make sense; *Stunz v. United States*, 27 F. 2d 575, 577 (C.A. 8) which involved a comment on the progress of the trial; *Van Riper v. United States*, 13 F. 2d 961, 967 (C.A. 2), certiorari denied 273 U. S. 702 where the contents are not set forth; *United States v. Hirsch*, 74 F. 2d 215, 218 (C.A. 2), certiorari

denied, 295 U. S. 739 in which sensational matters were published but defense counsel's request to interrogate the jurors was denied and there was no finding the jurors had read; *Bratcher v. United States*, 149 F. 2d 742, 746 (C.A. 4), certiorari denied, 325 U. S. 885 where only newspaper accounts of the trial were involved.

The only strong case cited by the government is *United States v. Postma*, 242 F. 2d 488, 495 (C.A. 2), certiorari denied, 354 U. S. 922.*

Some of the cases to the contrary where the reading of newspaper articles was sufficient for mistrial or new trial because of general defamatory or prejudicial matter being recited are: *Briggs v. United States*, 221 F. 2d 636 (C.A. 6); *Harrison v. United States*, 200 Fed. 662 (C.A. 6); *Griffin v. United States*, 295 Fed. 437 (C.A. 3); *McKibben v. Philadelphia & R. Ry.*, 251 F. 577 (C.A. 3); and see *Welch v. United States*, 135 F. 2d 465, 466-468 (C.A. D.C.). Neither the *Briggs* case, the *Harrison* case, or *Griffin* cases based their ruling on misconduct as the government asserts although misconduct was involved.

The difficulty of attempting to formulate any rules from the above cases cited by the government and then formulating any rule to apply in the instant situation is that the nature of their publications differed so sharply from the matters published in the instant case. It may easily be argued, for various reasons, that where certain inflammatory matter is received, which matter does not fall into a well defined category, that no hard and fast rule can be applied. One reason, impliedly, is that we accept the intrusions of the press into the admittedly imperfect workings of the jury system as a necessary evil.

*Petitioner mistakenly stated certiorari was denied with comment, p. 6 of Petitioner's brief.

although why this is so to a party denied a fair trial is hard to explain. It may be simply that a mistrial should be declared and costs taxed to the offending newspaper after appropriate hearing by the trial court.

Once however intrusions on the jury by newspapers or radio are permitted as necessary evils, and mistrials are not declared as a matter of course in instances of general prejudicial items, it does not follow as a corollary that there cannot be fixed instances in which the publication is considered "ineradicably prejudicial". Admittedly, if it is conceded that general prejudicial intrusions will occur as a necessary evil and mistrial is not declared as a matter of course, discretion as to general defamatory publications should be left with the trial court, cf. the *Briggs* case *supra*, at p. 638 attempting to set forth some rules.

But in this instance there is a clear category already recognized by all courts that past criminal activity and previous convictions are prejudicial and grounds for new trial. This in effect is the rule of the cases cited pp. 10-11 of petitioners opening brief where such publications have with one exception resulted in mistrial or new trial. That such categories of "ineradicably prejudicial" matter are impliedly recognized is seen in the concurring opinion in *Shepherd v. Florida*, 341 U. S. 50, where alleged confessions of defendants were brought to the jurors attention before trial, the confessions never coming into evidence either because of their inadmissible character or other reasons. In the *Shepherd* case if such inadmissible confessions had been introduced, mistrial would have resulted and the same rationalization applies here.

Nothing in the answer brief meets the position maintained by petitioner that the matters manifestly prejudicial *per se* and inadmissible in open court may not be con-

veyed to jurors by newspapers in the jury room or in the home or on the street. Why the rule should be applied when such matter is broached in open court but not in the jury room or out of court is not met by the answer brief of the government, nor is reference made thereto.

Answer is made that the discretion is justified because jurors are capable of disregarding such matters under instructions of court, citing *Weld & Danzig, A Study of the Way in Which a Verdict is Reached by a Jury*, 53 Am. J. Psch. 518, 526 (fn. 4). Reply to that is found in the opening sentence of that article: "Little is known about the manner in which the evidence in a court-trial is received, weighed, and accepted by a jury." p. 518. Moreover, the study involved not actual courtroom and jury-room experiences but three controlled instances wherein three juries in moot court, the jurors being psychology students, listened to a rehearsed mock trial of a civil action. Those facts should indicate that the authority should not have bearing here. There are numerous schools of thought on the jury and its role in this respect, conflicting enough that no general rule can be drawn as to how and to what extent a juror receives and understands evidence and instructions of court. See, Note, Jurors on Trial, 17 Mo. L. Rev. 235-251; The Jury System in America, Bok, Vol. 287, May, 1953, Annals Am. Acad. 97-102; Courts on Trial, Frank, 108-125; Bromley, Free Press v. Free Trial, Vol. 202, March, 1951, Harpers, pp. 91-96 for but a few of the thoughts expressed on this subject.

The comparison the answer brief attempts to draw between *voir dire*, the rule against a juror impeaching his verdict, and the present situation does not hold up. On *voir dire*, the counsel for both sides have much more latitude in their approach in questioning jurors. Questioning of the prospective juror can be more keen and pursued

with greater vigor. Counsel has his peremptory challenges if his challenge for cause is denied. Jurors are not under the same restraint in answering questions as in the situation where a juror already impaneled has received outside impressions contrary to court instructions, see Justice Edgerton dissenting, *Welch v. United States*, 135 F. 2d 465, 467-468 (C.A. D.C.) and cf. the dissenting opinion of Judge Murrah in the instant case R. 64. The dissent in the *Welch* case notes: "I think this was not a case in which silence could safely be interpreted as a denial. If anything, silence implied an admission. The judge's questions could hardly fail to remind the jury that they ought not to have read anything about the trial. 'Have you read the articles?' was roughly equivalent to 'Have you committed the impropriety of reading the articles?' A juror who could honestly exculpate himself by a denial would be likely to do so." See also in this connection, the Briggs case, supra, p. 639. Further reply can be made to the *voir dire* situation in that in the *Shepherd* case the jurors had read of the defendants' confessions before trial and presumably on *voir dire* answered in such manner that on the surface at least their answers were not such as to justify a challenge for cause. The same comparison prevails here. Actually, the situation more comparable to the instant one of the three is the situation where the jury verdict cannot be impeached by a juror for there, as here, the jurors have been finally chosen and the die is cast so to speak.

THE MATTER OF ENTRAPMENT WAS PROPER FOR JURY CONSIDERATION AND HAS BEARING ON THE QUESTION HERE CERTIFIED.

The position of the government in its answer brief is that entrapment was not an issue sufficient to go to the jury, and should not have gone to the jury as it did, and

in effect no harm could have resulted as to such a possible defense as a result of the jury's reading petitioner's alleged criminal background and criminal activity. The position is also taken that in such event Judge Murrah's dissent loses its force, p. 12 of the government's brief. But the dissent does not make the entrapment point its only quarrel with the majority for it sets forth points most ably, such as: "'trial by newspaper' even in the very midst of irresponsible news comment, is neither inevitable nor tolerable," R. 63 and "In sum, it is my view that if the extraneous matter disclosed in the newspaper articles is forbidden, it is ineradicably prejudicial . . . In any event, I would reverse for new trial." R. 65

An issue for the jury's consideration came about as to the creative activity of the government, the playing upon the sympathy of the petitioner by stating long drives at night were involved and the government agent wanted the "stay awake" pills to aid him in driving the evenings in question, the failure of the government to have rebuttal testimony on entrapment — all combined to create an issue as to entrapment for the jury's consideration. *Sherman v. United States*, 356 U. S. 369, 373, 377. R. 8-26, 35-36. The refusal of this Court to grant certiorari on the second point, i.e. that entrapment was established as a matter of law when the government had no rebuttal testimony after the door was opened to entrapment, is not a ruling that there was no issue on entrapment to go to the jury.

The newspaper articles involved herein necessitated mistrial for the reasons stated in the first argument of this reply brief and most certainly necessitated mistrial in light of the entrapment issue given to the jury by the court.

CONCLUSION

It is respectfully submitted that the relief prayed for in petitioner's opening brief be granted.

GEORGE J. FRANCIS,
FRANCES DE LOST,
817 Farmers Union Bldg.,

OMER GRIFFIN,
First National Bank Bldg.,
Denver, Colorado,

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 383.—October Term, 1958.

Howard R. Marshall, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 15, 1959.]

Per Curiam.

Petitioner was convicted of unlawfully dispensing a number of dextro amphetamine sulfate tablets, a drug within the scope of 21 U. S. C. § 353 (b)(1)(B), without a prescription from a licensed physician, which resulted in misbranding and violation of 21 U. S. C. § 331 (k). The Court of Appeals affirmed, one judge dissenting, 258 F. 2d 94. The case is here on a petition for certiorari, 28 U. S. C. § 1254 (1), which we granted because of doubts whether exposure of some of the jurors to newspaper articles about petitioner was so prejudicial in the setting of the case as to warrant the exercise of our supervisory power to order a new trial. 358 U. S. 892.

Petitioner never took the stand; nor did he offer any evidence. A government agent testified that he was introduced to petitioner as a salesman who had difficulty staying awake on long automobile trips and that on two occasions he obtained these tablets from petitioner. Petitioner asked the trial judge to rule there was entrapment as a matter of law. The judge refused so to hold and submitted the issue of entrapment with appropriate instructions to the jury. Cf. *Masciale* v. *United States*, 356 U. S. 386. The Government asked to be allowed to prove that petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. The trial judge refused this offer saying, "It would be just like offering evidence that he picked

pockets or was a petty thief or something of that sort which would have no bearing on the issue and would tend to raise a collateral issue and I think would be prejudicial to the defendant."

Yet during the trial two newspapers containing such information got before a substantial number of jurors. One news account said:

> "Marshall has a record of two previous felony convictions.
>
> "In 1953, while serving a forgery sentence in the State Penitentiary at McAlister, Okla., Marshall testified before a state legislative committee studying new drug laws for Oklahoma.
>
> "At that time, he told the committee that although he had only a high school education, he practiced medicine with a $25 diploma he received through the mails. He told in detail of the ease in which he wrote and passed prescriptions for dangerous drugs."

The other news account said:

> "The defendant was Howard R. (Tobey) Marshall, once identified before a committee of the Oklahoma Legislature as a man who acted as a physician and prescribed restricted drugs for Hank Williams before the country singer's death in December, 1953.
>
> . . . . .
>
> "Marshall was arrested with his wife, Edith Every Marshall, 56, in June, 1956. She was convicted on the drug charges in Federal District Court here in November and was sentenced to 60 days in jail.
>
> "Records show that Marshall once served a term in the Oklahoma penitentiary for forgery. There is no evidence he is a doctor, court attaches said."

The trial judge on learning that these news accounts had reached the jurors summoned them into his chamber one by one and inquired if they had seen the articles.

Three had read the first of the two we have listed above and one had read both. Three others had scanned the first article and one of those had also seen the second. Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles. The trial judge, stating he felt there was no prejudice to petitioner, denied the motion for mistrial.

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt* v. *United States*, 218 U. S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson* v. *United States*, 335 U. S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures.

In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts (*Bruno* v. *United States*, 308 U. S. 287; *McNabb* v. *United States*, 318 U. S. 332) we think a new trial should be granted.

Reversed.

MR. JUSTICE BLACK dissents.